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A TREATISE
ON
THE LAW
OF
EXECUTORS AND ADMINISTRATORS

BY
THE RIGHT HONOURABLE
SIR EDWARD VAUGHAN WILLIAMS
(LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS).

Fifth Edition

BY
THE HONOURABLE
SIR ROLAND L. VAUGHAN WILLIAMS, KNT.,
(ONE OF THE JUSTICES OF HER MAJESTY'S HIGH COURT OF JUSTICE).

IN TWO VOLUMES.
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PREFACE

TO THE

NINTH EDITION.



It is with great diffidence that I offer to the Profession this Edition of my Father's great work.

In the last Edition, the Editors, in their desire to leave as much as possible unaltered the text of the Author, did not attempt to do more than note up the cases and statutes which had been decided and passed since the last Edition, for which Sir Edward Vaughan Williams was personally responsible, was published. What was done in the way of alteration was chiefly the work of my late Brother, Walter Vere Vaughan Williams.

The lapse of a quarter of a century since the last Edition by Sir Edward Vaughan Williams has made it impossible to avoid altogether alterations of and additions to the text of the Author. It was impossible to introduce into the new Edition, by means of notes only, great changes, of which the Judicature Acts and the Married Women's Property Acts are examples, and the text, therefore, had necessarily to be somewhat altered; but feeling how much the authority of the

book depends on the maintenance of the old text, I have tried to make these alterations as small as possible, and I hope that critics will indulgently remember that the problem how to maintain the text and yet introduce the new matter was one of great difficulty, and which could not be worked out with absolute uniformity. Moreover, day by day, as the work of this new Edition proceeded, I became more and more filled with admiration for the original, and more impressed with my own inability as Editor to supply my Father's place. This it is which makes me ask the indulgence of the Profession towards what has been a great effort on my part. I, personally, have made every addition and alteration, except that my friend Mr. Eustace Smith, of the Chancery Bar, was good enough to re-draft for me the Chapters upon Equity Practice.

I have also to thank my friend and late pupil, Mr. John Ogle, of the Inner Temple, for constant assistance throughout the whole of the necessarily long period devoted to the preparation of this Edition. Mr. Wasey Sterry, of Lincoln's Inn, prepared the Index for me and has also afforded me much assistance by his conscientious work and lawyer-like accuracy when acting as my amanuensis. My friend and late pupil, Mr. E. W. Hansell, of the Inner Temple, also gave me his assistance, especially with the Chapters on Common Law Practice. In conclusion I wish to say that I finished my work shortly

before the Spring Circuit, and therefore, so far as I am concerned, the cases and statutes only come down to that date.

I am happy to say, however, that the Publishers have arranged with my friend Mr. John Ogle to prepare the Addenda, which will be found after the Index of Cases. In this he has given references to all the cases lately decided, and has also dealt with the Trustee Act, 1893, which was passed during the present Session of Parliament, and which comes into force on January 1st, 1894. This Act, while it in no way alters the law affecting the powers and liabilities of trustees, consolidates the various Statutes relating to those subjects which have been passed from time to time.

A table will be found at the end of the Addenda setting out the short effect of each section of the new Act, and indicating the various sections of preceding Statutes repealed and re-enacted by it.

R. V. W.

November, 1893.

THE STATUTE 1 VICT. c. 26.

An Act for the Amendment of the Laws with respect to Wills. [3rd July, 1837.]

Meaning of
certain words
in this Act ;

“Will :”

12 Car. II.
c. 24.

14 & 15 Car.
II. (1).

“Real estate :”

“Personal
estate :”

BE it enacted, That the words and expressions herein-
after mentioned, which in their ordinary signification have
a more confined or a different meaning, shall in this Act,
except where the nature of the provision or the context of
the Act shall exclude such construction, be interpreted as
follows : (that is to say), the word “Will” shall extend to
a testament, and to a codicil, and to an appointment by Will
or by writing in the nature of a Will in exercise of a power,
and also to a disposition by Will and testament or devise of
the custody and tuition of any child, by virtue of an Act
passed in the twelfth year of the reign of King Charles the
Second, intituled *An Act for taking away the Court of
Wards and liveries and tenures*, in capite and by knights
service, and purveyance, and for settling a revenue upon his
Majesty in lieu thereof, or by virtue of an Act passed in the
Parliament of Ireland in the fourteenth and fifteenth years
of the reign of King Charles the Second, intituled *An Act
for taking away the Court of Wards and liveries and tenures*
in capite and by knights service, and to any other testa-
mentary disposition ; and the words “real estate” shall
extend to manors, advowsons, messuages, lands, tithes, rents,
and hereditaments, whether freehold, customary freehold,
tenant right, customary or copyhold, or of any other tenure,
and whether corporeal, incorporeal, or personal, and to any
undivided share thereof, and to any estate, right, or interest
(other than a chattel interest) therein ; and the words “per-
sonal estate” shall extend to leasehold estates and other
chattels real, and also to monies, shares of government and
other funds, securities for money (not being real estates),
debts, choses in action, rights, credits, goods, and all other

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property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

1 Vict. c. 26.

Number :

Gender :

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two parts of his Land*; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The Bill concerning the explanation of Wills*: and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins*; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estates being assets, or to nuncupative Wills, or to the repeal, altering, or changing of any Will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein: and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better*

Repeal of the Statutes of Wills, 32 H. VIII. c. 1, and 34 & 35 H. VIII. c. 5.

10 Car. I. Sess. 2, c. 2 (1).

Sects. 5, 6, 12, 19, 20, 21 & 22 of the Statute of Frauds, 29 Car. II. c. 3: 7 W. III. c. 12 (1).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10 (1).

1 Vict. c. 26.
Sect. 9 of 14
G. II. c. 20.

25 G. II. c. 6
(except as to
colonies).

25 G. II. c. 11
(I).

55 G. III.
c. 192.

All property
may be dis-
posed of by
Will;

comprising
customary

Advancement of Justice as relates to witnesses to nuncupative Wills: and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries,"* as relates to estates *pur autre vie*: and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America,* except so far as relates to his Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates*; and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will,* shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any Wills or estates *pur autre vie*, to which this Act does not extend.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate (a) which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator: and that the power hereby given shall extend

(a) See *infra*, p. 2.

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(b) See *in*

to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his Will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a Will or otherwise, could not at law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a Will or a surrender to the use of a Will should continue in force for a limited time only, or any other special custom, could not have been disposed of by Will according to the power contained in this Act, if this Act had not been made: and also to estates *pur autre vie* (b), whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate (c), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or Will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will (d).

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the

1 Vict. c. 26.

freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*:

contingent interest;

rights of entry and property acquired after execution of the Will.

As to the fees and fines payable by devisees of customary and

(b) See *infra*, p. 601.

(c) See *infra*, p. 771 *et seq.*

(d) See *infra*, pp. 3, 4, 174.

1 Vict. c. 26.

copyhold
estates.

custom of the manor of which the same is holden, have been surrendered to the use of a Will, and the testator shall not have surrendered the same to the use of his Will, no person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the Will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the Will of such testator: Provided also, That where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto have surrendered the same to the use of his Will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such Will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the Will, or of presenting, registering, or enrolling such surrender, and the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his Will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of Wills of customary freeholds to be entered on the court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by Will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the Will by which such disposition shall be made, or

so much the state, to be reputed man Will of such the declarati state in the subject to the such real est this Act had duties and se as would have descent of the the devisee of and enforcing he is now en from or again

VI. And be Will shall be nature, the s heir, if it sha as assets by simple; and any estate pur hold, tenant tenure, and w it shall go to t had the estat same shall co reason of a s shall be assets distributed in testator or int

VII. And b person under t

VIII. Provi

(e) See infra

so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor: and when any trusts are declared by the Will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such Will: and when any such real estate could not have been disposed of by Will if this Act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

1 Vict. c. 26.

and the lord to be entitled to the same fine, &c., when such estates are not now devisable as he would have been from the heir in case of descent.

VI. And be it further enacted, That if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (e).

Estates *pur autre vie*.

VII. And be it further enacted, That no Will made by any person under the age of twenty-one years shall be valid (f).

No Will of a person under age valid;

VIII. Provided also, and be it further enacted, That no

(e) See *infra*, pp. 601, 1540.

(f) See *infra*, p. 12.

1 Vict. c. 26.

nor of a *feme covert*, except such as might now be made.

Every Will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

Appointments by Will to be executed like other Wills, and to be valid, although other required solemnities are not observed.

Soldiers' and mariners' Wills excepted.

Act not to affect certain provisions of 11 Geo. IV. & 1 Wm. IV. c. 20, with respect to Wills of petty officers and seamen and marines.

Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act (*g*).

IX. And be it further enacted, That no Will shall be valid unless it shall be in writing and executed in manner herein-after mentioned (*h*); (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction (*hh*), and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary (*i*).

X. And be it further enacted, That no appointment made by Will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every Will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act (*k*).

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth, and the first year of the reign of his late Majesty King William the Fourth, intituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy*, respecting the Wills of petty officers and seamen in

(*g*) See *infra*, pp. 46, 179, 309.

(*h*) See *infra*, p. 63.

(*hh*) See *infra*, pp. 64, 72.

(*i*) See *infra*, pp. 73, 81.

(*k*) See *infra*, pp. 63, 104 *et seq.*, 332.

(*l*) See *infra*,

the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect to services in her Majesty's navy.

1 Vict. c. 26.

XIII. And be it further enacted, That every Will executed in manner hereinbefore required shall be valid without any other publication thereof (l).

Publication not to be requisite.

XIV. And be it further enacted, That if any person who shall attest the execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such Will shall not on that account be invalid.

Will not to be void on account of incompetency of attesting witness.

XV. And be it further enacted, That if any person shall attest the execution of any Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will (m).

Gifts to an attesting witness to be void.

XVI. And be it further enacted, That in case by any Will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such Will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such Will, or to prove the validity or invalidity thereof.

Creditor attesting to be admitted a witness.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a Will, be incom-

Executor to be admitted a witness.

(l) See *infra*, pp. 63, 78.

(m) See *infra*, pp. 898, 899.

1 Vict. c. 26. petent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof (*n*).

Will to be
revoked by
marriage.

XVIII. And be it further enacted, That every Will made by a man or woman shall be revoked by his or her marriage (*o*) (except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

No Will to be
revoked by
presumption.

XIX. And be it further enacted, That no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*p*).

No Will to be
revoked but
by another
Will or codicil,
or by a writing
executed like
a Will, or by
destruction.

XX. And be it further enacted, That no Will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*q*).

No alteration
in a Will shall
have any effect
unless executed as a
Will.

XXI. And be it further enacted, That no obliteration, interlineation, or other alteration made in any Will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the Will opposite or near to such alteration, or at the foot or

(*n*) See *infra*, p. 284.

(*o*) See *infra*, p. 160.

(*p*) See *infra*, pp. 156, 161.

(*q*) See *infra*, pp. 110, 111, 120, 125, 153.

end of or operation, and writing.

XXII. And or any part shall be revoked by a codicil and showing Will or codicil wholly revoked tend to so the revocation the contrary and

XXIII. And or other Act a Will of or comprised, executed as aforesaid with respect to estate as the time of

XXIV. And be construed, estate comprised been executed unless a contrary

XXV. And intention shall interest therein comprised in fail or be void lifetime of the contrary to law be included such Will (*r*).

(*r*) See *infra*,

(*s*) See *infra*,

172.

(*t*) See *infra*,

end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will (r).

Vict. c. 26.

XXII. And be it further enacted, That no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (s).

No Will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXIII. And be it further enacted, That no conveyance or other Act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death (t).

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIV. And be it further enacted, That every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will (u).

A Will shall be construed to speak from the death of the testator.

XXV. And be it further enacted, That unless a contrary intention shall appear by the Will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such Will (v).

A residuary devise shall include estates comprised in lapsed and void devises.

(r) See *infra*, pp. 110, 111, 123.

(u) See *infra*, pp. 175, 1193, 1298.

(s) See *infra*, pp. 152, 163, 168, 172.

(v) See *infra*, p. 1318.

(t) See *infra*, pp. 1192, 1193.

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the Will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (y).

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate

1 Vict. c. 26.

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death (y).

No devise to trustees or executors, except for a term or presentation to a church, shall pass a chattel interest.

Trustees under an unlimited devise where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

(y) See *infra*, p. 966, note (g).

(z) See *infra*, p. 604.

1 Vict. c. 26.

which the testator had power to dispose of by Will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of
estates tail
shall not
lapse.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

Gifts to chil-
dren or other
issue who leave
issue living at
the testator's
death shall
not lapse.

XXXIII. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will^(a).

Act not to
extend to
Wills made be-
fore 1838^(b),
nor to estates
pur autre vie
of persons who
die before
1838.

XXXIV. And be it further enacted, That this Act shall not extend to any Will made before the first day of January, one thousand eight hundred and thirty-eight, and that every Will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Act not to
extend to
Scotland.

Act may be
altered this
session.

XXXV. And be it further enacted, That this Act shall not extend to Scotland.

XXXVI. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament.

(a) See *infra*, p. 1085. (b) See *infra*, pp. 63, 112, 153, 170, 179.

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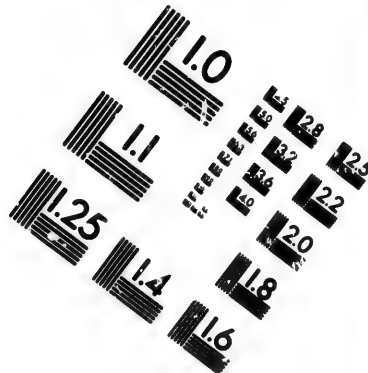
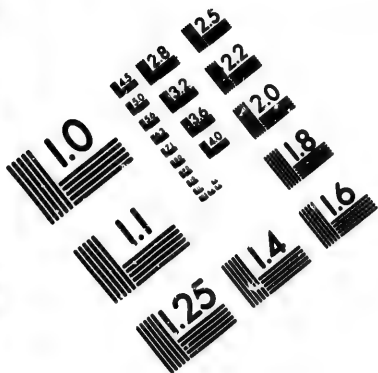
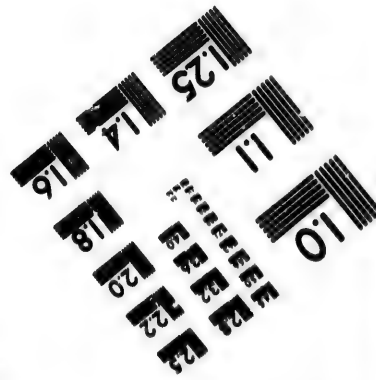
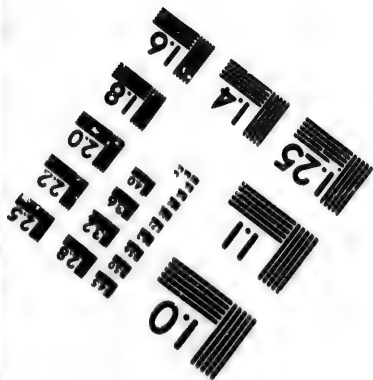
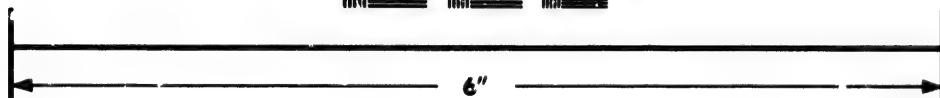
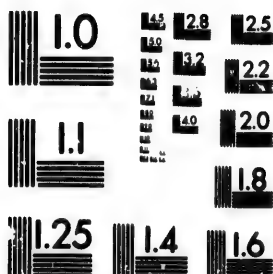


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ADDENDA AND CORRIGENDA.

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- 54, n. (f).—The will of a married woman who dies in the lifetime of her husband made during coverture and prior to the Married Women's Property Act, 1882, she having at the time capacity to make a will, is effectual without re-execution to pass separate property which she may acquire under the provisions of the Act. *Re Bowen*, (1892) 2 Ch. 291.
- 67, n. (u).—The whole of a disposing portion of a will was written on the first side of a sheet of foolscap, the second and third sides being blank; and the attestation clause with the signature of the testator and the witnesses being on the fourth side. It was held that the will was duly executed. *In the goods of Fuller*, (1892) P. 377.
- 79, n. (y).—See also *Wyatt v. Berry*, (1893) P. 5.
- 87, n. (c).—See also *In the goods of Marchant*, (1893) P. 254. In that case a testatrix left two testamentary documents of which only one was duly executed. The first or unexecuted document made various specific bequests and appointed an executor. The second, which was duly executed, bequeathed all the property of the testatrix to her nephew "for the purposes I require him to do absolutely." It was held that the two documents could not be admitted to probate as together constituting the will of the deceased, but that probate might be granted of the second or executed document with directions to the executor to administer the estate in conformity with the trusts of the first document.
- 114, n. (tt).—See *In the goods of Heath*, (1892) P. 253, in which a reference in a codicil showed that an interlineation had been made prior to the execution of the codicil, and was therefore incorporated by it.
- 191, n. (p).—Where a testatrix appointed A. and B. "trustees" of her will and expressed her wish that they should pay her funeral and other debts, it was held that they were constituted executors according to the tenor. *In the goods of Wilkinson*, (1892) P. 227. See also *In the goods of Russell*, *ibid.* 380.
- 248, n. (c).—See also *Copeland v. Simister*, (1893) P. 16.
- 282, n. (y).—A party giving notice under this rule cannot be condemned in costs, the power of the Court only existing where the party who gives the notice has taken proceedings to call in the probate. *Leigh v. Green*, (1892) P. 17; *Beale v. Beale* (L. R. 3 P. & D. 179) distinguished.
- 293, n. (l).—A testatrix left two wills and a codicil to the first will. The second will, which disposed only of a small policy of insurance on her life, was prepared for her on a printed form by one of her executors. The form commenced with a clause revoking all previous testamentary dispositions; but, when this was read over to her, she objected to it, saying that she did not wish to revoke her first will and codicil. The person who prepared the will assured her that, as it only related to the insurance policy, the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the will. Being satisfied by this assurance, the testatrix duly executed the will. It was held, on the authority of *Morrell v. Morrell*, that the testatrix must be taken to have known and approved of these words of revocation, and that they must be included in the probate of the last will. *Collins v. Elstone*, (1893) P. 1.

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- 293, n. (l).—A by which held of 188 Gordon
- 312, n. (d).—Re
- 315, n. (x).—Se was fo Atkins goods of
- 332, n. (m).—Gr Divis
- 384, n. (s).—Wh under a reason section widow, cited.
- 384, n. (s).—Gra the tes (1892) P
- 385, n. (s).—Gra (1892) P Joint In the go
- 402, n. (q).—See
- 403.—Grant of ad no know In the go
- 404, n. (d).—Wh years, th represent executrix the next
- 441, n. (c).—See
- 450, n. (h).—As to sea Dobbs
- 463, n. (v).—In t administr allowed to the testat constituti legatee.
- 482, n. (l).—Re CH case the r
- 511.—The incidence of the C governed the old p residuary 652, disti
- 515, line 22.—"P A testat

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- 293, n. (l).—A testatrix executed a will in 1887, and a subsequent will in 1889, by which she revoked all previous wills. In 1891 she executed a codicil which *by mistake* was described as a codicil to the will of 1887. It was held that probate might be granted of the codicil together with the will of 1889 *with the reference to the will of 1887 omitted*. *In the goods of Gordon*, (1892) P. 228. See also *In the goods of Moore*, (1892) P. 378.
- 312, n. (d).—*Roe v. Nix*, (1893) P. 55.
- 315, n. (x).—See also *Collins v. Elstone* (1893), P. 1, in which *Morrell v. Morrell* was followed, and the cases of *Guardhouse v. Blackburn*, *Atter v. Atkinson*, and *Fulton v. Andrew* were referred to. See also *In the goods of Moore*, (1892) P. 378.
- 332, n. (m).—Grant of administration to a Receiver appointed by the Chancery Division. *In the goods of Moore*, (1892) P. 145.
- 384, n. (s).—Where an executor before the death of the testator left the country under an assumed name, having sold all his effects, and there was reason to believe that he did not intend to return, the Court, under section 73, granted administration with the will annexed to the testator's widow, who was sole beneficiary, without requiring the executor to be cited. *In the goods of Crawshaw*, (1893) P. 108.
- 384, n. (s).—Grant made to a creditor, the sole executrix and universal legatee of the testator (his widow) being a lunatic. *In the goods of Atherton*, (1892) P. 104.
- 385, n. (s).—Grant to Clerk of the Guardians of the Poor. *In the goods of Everley*, (1892) P. 50.
Joint grant to next-of-kin and another person entitled in distribution. *In the goods of Walsh*, (1892) P. 230.
- 402, n. (g).—See *In the goods of Alston*, (1892) P. 142.
- 403.—Grant of administration with the will annexed to a stranger, there being no known relatives of the testator and no residuary legatee appointed. *In the goods of Jackson*, (1892) P. 257.
- 404, n. (d).—Where a sole executrix and legatee had not been heard of for forty years, the Court granted administration with the will annexed to the representative of the next-of-kin of the testatrix on proof that the executrix had been cited by advertisement, subject to administration to the next-of-kin being taken out. *In the goods of Ley*, (1892) P. 6.
- 441, n. (c).—See also *In the goods of Wright*, (1893) P. 21.
- 456, n. (h).—As to breach of condition to well and truly administer under s. 81, see *Dobbs v. Brain*, (1892) 2 Q. B. 207.
- 463, n. (v).—In the case of *In the goods of De Benyfort*, (1893) P. 231, an administratrix on application for administration with will annexed was allowed to give an administration bond with *two foreign sureties* where the testator, being a French subject resident in France, made a will constituting a domiciled French subject his universal and residuary legatee.
- 482, n. (l).—*Re Cliff's Trusts* is further reported in (1892) 2 Ch. 229. In this case the report of *L'Fit v. L'Hatt* is corrected.
- 511.—The incidence of the new duties imposed by s. 27 of this Act, and by s. 6 of the Customs and Inland Revenue Act, 1889 (see *post*, p. 521), is governed by the same principle as that which regulated the incidence of the old probate duty—viz. that it should be borne by the general residuary estate. *Re Bourne*, (1893) 1 Ch. 188; *Re Croft*, (1892) 1 Ch. 652, distinguished.
- 515, line 22.—"Person acting in the administration of the estate."
A testator bequeathed certain pictures and other property to be held

- by trustees as heirlooms. His executors caused a valuation to be made for probate purposes, and delivered to the Commissioners of Inland Revenue an affidavit of value with an account on the basis of such valuation duly stamped in accordance with the provisions of the Customs and Inland Revenue Act, 1881. Upon this a certificate was issued, stating the value as shown by the account, and probate was granted. Some time after the executors had finally wound up the estate, it was discovered that one picture had been omitted from the valuation, and that the others had been considerably undervalued. No suggestion was made of any negligence on the part of the executors or of any incompetence on the part of the valuer. On an information, praying that the executors might be ordered to deliver a further affidavit and account in accordance with the provisions of s. 32, it was held by the Court of Appeal, affirming the decision of the Divisional Court, (1892) 2 Q. B. 289, that the executors, having completed the duties of administration, were not "persons acting in the administration of the estate" within the meaning of the section, and were not liable. *Att.-Gen. v. Smith*, (1892) 2 Q. B. 289, affirmed, (1893) 1 Q. B. 239.
- 582, n. (y).—See also *Re Clowes*, (1893) 1 Ch. 214.
- 538, n. (x).—See *Re Wilson*, (1893) 2 Ch. 340, in which case the principle regulating the devolution of land held for a partnership or other common object is discussed.
- 603, n. (c).—In *Stevens v. Trevor-Garrick*, (1893) 2 Ch. 307, it was held that the reasons given in *Hancock v. Hancock*, as to the effect of s. 19 on the operation of s. 5 of the Act, were equally applicable to modify the operation of s. 2.
- 784.—Section 26 of 22 & 23 Vict., c. 35 is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 23 of that Act.
- 802, n. (h).—See *Thorne v. Thorne*, (1893) 3 Ch. 196.
- 815.—Section 37 of the Conveyancing and Law of Property Act, 1881, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 21 of that Act.
- 826.—Section 38 of the Conveyancing and Law of Property Act, 1881, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 22 of that Act.
- 923, n. (o).—A bequest to a religious institution or for a religious purpose is *prima facie* a bequest for a "charitable" purpose, and the law applicable to "charitable" bequests as distinguished from the law applicable to ordinary bequests ought to be applied to a bequest to a religious institution or for a religious purpose. *Re White*, (1893) 2 Ch. 41.
- 963, n. (p).—See the late case of *In the goods of Ashton*, (1892) P. 33, in which the cases mentioned in this note are referred to and discussed.
- 1086, n. (r).—The rule that s. 33 of the Wills Act does not apply to children or grandchildren of the testator as a class is not affected by the fact that, in the events which happened, the class consisted of but one individual. *Re Harvey's Estate*, (1893) 1 Ch. 567.
- 1193, n. (z).—See also *Re Clowes*, (1893) 1 Ch. 214.
- 1228, n. (t).—The mere fact, however, that an executor has made general payments to or for the benefit of a legatee of leaseholds and other property—not specially out of or on account of the rents—is not, in the absence of representations on the subject by the executor to the legatee, sufficient to enable the Court to infer that the legacy has been assented to. *Thorne v. Thorne*, (1893) 3 Ch. 196.
- 1249, n. (m).—Section 3 of the Trust Investment Act, 1889, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 1 of that Act.

- 1251, n. (o).—See *Re Ches*
- 1263.—Section 3 (56 & 57 Vict., c. 53)
- 1266, n. (z).—For *Humph*
- 1322, n. (h).—See
- 1392, n. (y).—The habitatio *Re Craig*
- 1396, n. (f).—W of domici of the in
- 1600, n. (k).—Pro Locomoti a person executor conducted
- 1628, n. (p).—An in a build holder the
- 1652, n. (r).—*Re A*
- 1695.—Section 37 repealed b enacted by
- 1704, n. (x).—Secti 1893 (56 & 57 Vict., c. 53) with the applies to nothing "which he is which he is trust."
- 1706, n. (a).—The Act, 1888, 1888, are re
- 1710—1714.—The T of sections 1 The section inclusive, v power is giv of holders of annuities section 1 (k), the capital State in Cou
- 1714.—The provision Investment Act, 1893, in addition to a invest in re creating the the power to term of not lo

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- 1251, n. (o).—See also *Re Hengler*, (1893) 1 Ch. 586, in which the principle of *Re Chesterfield's Trusts* and *Beavan v. Beavan* is applied.
- 1263.—Section 32 of 36 Geo. III., c. 52, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53). Provisions for the payment into Court by trustees are contained in s. 42 of the latter Act.
- 1266, n. (z).—For a case in which a "contrary intention" was expressed, see *Re Humphreys*, (1893) 3 Ch. 1. In this case *Re Wells* was approved.
- 1322, n. (h).—See *Re Davies*, (1892) 3 Ch. 63.
- 1392, n. (y).—The domicile of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom. *Re Craignish*, (1892) 3 Ch. 180.
- 1396, n. (f).—Where the domicile of birth is changed during infancy by a change of domicile of the father, *semble*, the altered domicile cannot be regarded as the infant's domicile of origin. *Re Craignish*, (1892) 3 Ch. 180.
- 1600, n. (k).—Proceedings by a road authority under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, are in the nature of an action for a personal tort, so that proceedings cannot be taken against the executor of a person by whose orders the extraordinary traffic was conducted. *Story v. Sheard*, (1892) 2 Q. B. 515.
- 1628, n. (p).—An executor is not entitled on behalf of the estate to take shares in a building society or to make the estate liable for him as a shareholder therein. *Per Romer, J. Thorne v. Thorne*, (1893) 3 Ch. 196, 203.
- 1652, n. (r).—*Re Parkin*, (1892) 3 Ch. 510, 520.
- 1695.—Section 37 of the Conveyancing and Law of Property Act, 1881, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 21 of that Act.
- 1704, n. (x).—Section 7 of the Trustee Act, 1888, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by section 18 of that Act with the addition of a sub-section (3), declaring that the section applies to trusts created before or after 1st January, 1894, but that nothing "in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust."
- 1706, n. (a).—The Trustee Act, 1893 (56 & 57 Vict., c. 53), repeals the Trustee Act, 1888, except as to ss. 1 and 8. Sections 4 and 5 of the Trustee Act, 1888, are re-enacted verbatim by ss. 8 and 9 of the Act of 1893.
- 1710—1714.—The Trust Investment Act, 1889, is repealed (with the exception of sections 1 and 7) by the Trustee Act, 1893 (56 & 57 Vict., c. 53). The sections set out in these pages are re-enacted by sections 1 to 4 inclusive, with merely the following additions, viz., in section 1 (j), power is given to invest in "deferred annuities comprised in the register of holders of annuity Class D., and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company," and in section 1 (k), power is given to invest in railway stock in India "upon the capital of which the interest is guaranteed by the Secretary of State in Council of India."
- 1714.—The provisions relating to investments authorised apart from the Trust Investment Act, 1889, here referred to, are repealed by the Trustee Act, 1893, and are re-enacted by s. 5 of that Act. That section, in addition to such enactments, provides that a trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest, and shall be deemed to have always had the power to invest "on mortgage of property held for an unexpired term of not less than 200 years, and not subject to a reservation of rent

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greater than a shilling a year, or to any right of redemption or to any condition for re-entry except for non-payment of rent." The Trustee Act, 1893, s. 6, gives a trustee power to invest in the purchase or on mortgage of any land, notwithstanding drainage charges, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

By s. 7, trustees, unless authorised by the terms of their trust, are forbidden to apply for or hold certificates to bearer, issued under the authority of the India Stock Certificate Act, 1863, the National Debt Act, 1870, the Local Loans Act, 1875, or the Colonial Stock Act, 1877.

1725.—Section 2 of the Trustee Act, 1888, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 17 of that Act, with the addition of a sub-section (5), which provides that "nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

1735.—Section 31 of Lord St. Leonard's Act (22 & 23 Vict., c. 35) is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 24 of that Act.

1740.—Section 6 of the Trustee Act, 1888, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), and is re-enacted by s. 45 of that Act.

1817, 1820.—The Trustee Act, 1850, is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53), except in so far as relates to the Court exercising jurisdiction in Lunacy in Ireland. The effect of the sections of the new Act which take the place of the sections in the repealed Act is given in the table hereafter set out.

1823.—Section 30 of Lord St. Leonard's Act (22 & 23 Vict., c. 35) is repealed by the Trustee Act, 1893 (56 & 57 Vict., c. 53).

1879.—When an order is made under Ord. XVI. r. 46, R. S. C. 1883, it should appear on the face of the order to render it binding on the estate of a deceased person either that the Court having had its attention drawn to this point has dispensed with the legal personal representative of the deceased person interested in the matter or has appointed some person to represent the estate. *Re Richerson*, (1893) 3 Ch. 146.

1887, 1888.—The Trustee Acts, 1850 and 1852, are repealed and practically re-enacted by the Trustee Act, 1893 (56 & 57 Vict., c. 53). The table hereafter set out shows the provisions of the new Act which take the place of those in the repealed Acts.

1928, line 18.—The exception contained in this sub-section was held not to apply, in the absence of fraud, where trust funds advanced on mortgage were with the concurrence of the mortgagor applied in payment of a debt previously charged on the mortgaged property in favour of a bank in which the trustee was a partner. *Re Gurney*, (1893) 1 Ch. 590.

1928, n. (oo).—*Re Page*, (1893) 1 Ch. 304.

1938, n. (y).—*Charles v. Jones*, explained in *Re Beddoe*, (1893) 1 Ch. 547.

1941, n. (u).—See *Re Beddoe*, (1893) 1 Ch. 547, 555.

This Act, described as repealing the various provisions of the repealed provisions.

The following correspond with the

- Sect. 1. Authorisation
- " 2. Purchase
- " 3. Discretion
- " 4. Application
- " 5. Enlargement

" 6. Power to charge

" 7. Trustees' certificates

" 8. Loans and advances

" 9. Liability for investments

" 10. Power of sale

" 11. Retirement

" 12. Vesting of trustees

" 13. Power of trustees

" 14. Power to appoint

" 15. Power to appoint

" 16. Married women

" 17. Power to appoint

" 18. Power to appoint

" 19. Power of trustees

" 20. Power of trustees

" 21. Power of trustees

" 22. Powers of trustees

" 23. Exonerations

" 24. Implied powers

TRUSTEE ACT, 1893.

This Act, described as "*an Act to consolidate Enactments relating to Trustees*," repeals the various sections of Statutes mentioned in the Schedule, and re-enacts the repealed provisions.

The following table shows the various sections of the Trustee Act which correspond with the repealed sections :—

Sect. 1. <i>Authorised Investments</i>	52 & 53 Vict., c. 32, s. 3.
" 2. <i>Purchase at a premium of redeemable stocks</i>	— s. 4.
" 3. <i>Discretion of trustees</i>	— s. 5.
" 4. <i>Application of Act</i>	— s. 6.
" 5. <i>Enlargement of express powers of investment</i>	34 & 35 Vict., c. 27; 28 & 29 Vict., c. 78, s. 40; 43 & 44 Vict., c. 8, s. 7; 27 & 28 Vict., c. 114, s. 60; 38 & 39 Vict., c. 83, s. 27.
" 6. <i>Power to invest notwithstanding drainage charges</i>	10 & 11 Vict., c. 32, s. 53.
" 7. <i>Trustees not to convert inscribed stock into certificates to bearer</i>	26 & 27 Vict., c. 73, s. 4; 33 & 34 Vict., c. 71, s. 29; 38 & 39 Vict., c. 83, s. 21; 40 & 41 Vict., c. 59, s. 12.
" 8. <i>Loans and investments by trustees not chargeable as breaches of trust</i>	51 & 52 Vict., c. 59, s. 4.
" 9. <i>Liability for loss by reason of improper investments</i>	51 & 52 Vict., c. 59, s. 5.
" 10. <i>Power of appointing new trustees</i>	44 & 45 Vict., c. 41, s. 31; 45 & 46 Vict., c. 39, s. 5; 55 & 56 Vict., c. 13, s. 6.
" 11. <i>Retirement of trustee</i>	44 & 45 Vict., c. 41, s. 32.
" 12. <i>Vesting of trust property in new or continuing trustees</i>	— s. 34.
" 13. <i>Power of trustee to sell by auction</i>	— s. 35.
" 14. <i>Power to sell subject to depreciatory conditions</i>	51 & 52 Vict., c. 59, s. 3.
" 15. <i>Power to sell under Stat. 37 & 38 Vict., c. 73</i>	37 & 38 Vict., c. 78, s. 3.
" 16. <i>Married woman as bare trustee may convey</i>	— s. 6.
" 17. <i>Power to authorise receipt of money by banker or solicitor</i>	51 & 52 Vict., c. 59, s. 2.
" 18. <i>Power to insure building</i>	— s. 7.
" 19. <i>Power of trustees of renewable leaseholds to renew and raise money for the purpose</i>	— ss. 10, 11.
" 20. <i>Power of trustees to give receipts</i>	44 & 45 Vict., c. 41, s. 36.
" 21. <i>Power of executors and trustees to compound, &c.</i>	— s. 37.
" 22. <i>Powers of two or more trustees</i>	— s. 38.
" 23. <i>Exoneration of trustees in respect of certain powers of attorney</i>	22 & 23 Vict., c. 35, s. 26.
" 24. <i>Implied indemnity of trustees</i>	— s. 31.

Sect. 25.	<i>Power of the Court to appoint new trustees</i>	13 & 14 Vict., c. 60, s. 32; 15 & 16 Vict., c. 55, ss. 8, 9; 46 & 47 Vict., c. 52, s. 147.
„ 26.	<i>Vesting orders as to land</i>	13 & 14 Vict., c. 60, ss. 7 to 18 inclusive; 15 & 16 Vict., c. 55, s. 2.
„ 27.	<i>Orders as to contingent rights of unborn persons</i>	13 & 14 Vict., c. 60, s. 16.
„ 28.	<i>Vesting order in place of conveyance by infant mortgagee</i>	— s. 8.
„ 29.	<i>Vesting order in place of conveyance by heir or devisee of heir, &c., or personal represen- tative of mortgagee</i>	— s. 19.
„ 30.	<i>Vesting order consequential on judgment for sale or mortgage of land</i>	— s. 29.
„ 31.	<i>Vesting order consequential on judgment for specific performance, &c.</i>	— s. 30.
„ 32.	<i>Effect of vesting order</i>	— ss. 33, 34.
„ 33.	<i>Power to appoint person to convey</i>	— s. 20.
„ 34.	<i>Effect of vesting order as to copyhold</i>	— s. 28.
„ 35.	<i>Vesting orders as to stock and choses in action</i>	— ss. 22, 23, 24, 25, 31, 35; 15 & 16 Vict., c. 55, ss. 3, 4, 5, 6; 18 & 19 Vict., c. 91, s. 10.
„ 36.	<i>Persons entitled to apply for orders</i>	13 & 14 Vict., c. 60, s. 37.
„ 37.	<i>Powers of new trustees appointed by the Court</i>	44 & 45 Vict., c. 41, s. 33.
„ 38.	<i>Power to charge costs on trust estate</i>	13 & 14 Vict., c. 60, s. 51.
„ 39.	<i>Trustees of charities</i>	— s. 45.
„ 40.	<i>Orders made upon certain allegations to be conclusive evidence</i>	53 & 54 Vict., c. 5, s. 14c.
„ 41.	<i>Application of vesting order to land out of England</i>	13 & 14 Vict., c. 60, s. 54.
„ 42.	<i>Payment into Court by trustees</i>	10 & 11 Vict., c. 96, s. 1; 12 & 13 Vict., c. 74.
„ 43.	<i>Power to give judgment in absence of trustee</i>	13 & 14 Vict., c. 60, s. 49.
„ 44.	<i>Power to sanction sale of land or minerals separately</i>	25 & 26 Vict., c. 108, s. 2.
„ 45.	<i>Power to make beneficiary indemnity for breach of trust</i>	51 & 52 Vict., c. 59, s. 6.
„ 46.	<i>Jurisdiction of Palatine and County Courts</i>	17 & 18 Vict., c. 82, s. 11; 52 & 53 Vict., c. 47, s. 8.
„ 47.	<i>Application to trustees under Settled Land Acts of provisions as to appointment of trustees</i>	53 & 54 Vict., c. 69, s. 17.
„ 48.	<i>Trust estates not affected by trustee becoming a convict</i>	13 & 14 Vict., c. 60, ss. 46, 47.
„ 49.	<i>Indemnity</i>	15 & 16 Vict., c. 55, s. 7.
„ 50.	<i>Definitions</i>	
51—54.	<i>Repeal, extent of Act, short title and com- mencement</i>	

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OF THE ORIGIN OF WILLS OF PERSONAL ESTATE.

ALTHOUGH from the time of the Norman Conquest, until the passing of the Statute of Wills (32 & 34 H. VIII.), a subject of this realm had, generally speaking, no Testamentary power over *Land*; yet the power of making a Will of *Personal Property* appears to have existed and continued from the earliest period of our Law. And, under the description of personal property so disposable, are not only to be considered goods and chattels, but also terms for years and chattel interests in Land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were disposable by Will (a).

But this power, it seems, did not extend to the whole of a man's personal estate, unless he died without either wife or issue; for by the common law, as it stood, according to Glanvil, in the reign of Hen. II., a man's goods were to be divided into three equal parts; one of which went to his

At common law a man could not bequeath the whole of his personal estate, unless he died with-

(a) Co. Lit. 111, b. n. (1), by Hargrave.

out either wife
or children :

writ de ratio-
nabili parte
bonorum :

controversy
whether this
was the gene-
ral law, or only
obtaining in
particular
places by
custom.

Alteration of
the law :

The Wills Act,
Vict. c. 26.

heirs, or lineal descendants, another to his wife, and the third was at his own disposal : or if he died without a wife he might then dispose of one moiety, and the other went to his children : and so, *è converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other ; but if he died without either wife or issue, the whole was at his own disposal (b). The shares of the wife and children were called their reasonable parts : and the writ *de rationabili parte bonorum* was given to recover them (c). This writ lay for the wife against the executors of her husband, and was founded on a complaint that the said executors unjustly detained from the plaintiff her reasonable part of the goods and chattels which were of the deceased and refused to render the same to her (d). And the sons and daughters were entitled to the like writ against the executors in case their third part was withheld (e).

It must indeed be remarked, that there has been a controversy whether this was the general law of the land, or only such as obtained in particular places by custom (f). The law, however, whether general or prevailing in particular places only by custom, was altered by imperceptible degrees and by a succession of statutes the old common law was utterly abolished throughout all the kingdom of England, so that a man might devise the whole of his chattels as freely as he formerly could his third part or moiety.

And now by stat. 1 Vict. c. 26, (which, however, does not extend to any Will made before Jan. 1, 1838,) it is enacted that it shall be lawful for every person to devise, bequeath or dispose of, by his Will executed as required by the Act, all real estate and all personal estate which he shall

(b) 2 Bl. Comm. 492.

(c) F. N. B. 122, L. 9th edit. ;
2 Saund. 66, n. (9).

(d) F. N. B. *ubi supra*.

(e) The word "*pueri*," was used in the writ, but was taken as meaning children of both sexes, it being held that sons and daughters

might join in the writ: Co. L. 176 b. n. (3), by Hargrave.

(f) As to this controversy see the gradual alteration of Law, in the former Editions of this Work and the authorities therein collected. Pt. I., Bk. I., Ch. I.

entitled to, either
death (g).

(g) See this enactment in *Perpetuities and Accumulations*, Preface. The Statute Clause (s. 1), enacts that "personal estate shall devolve upon the heirs of the person dying seised of leasehold estates, and also upon the heirs of the person dying seised of chattels real, and also upon the heirs of the person dying seised of shares of Government securities for money (being real estates), debts, and credits, and all property whatsoever, shall devolve upon any executor, administrator, and to any

Ch. I.] *Origin of Wills of Personal Property.*

3

entitled to, either at law or in equity, at the time of his death (g).

(c) See this enactment (s. 3), the Interpretation, Preface. The Interpretation Clause (s. 1), enacts that the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods and all property whatsoever which by law devolves upon any executor or administrator, and to any share or

interest therein. But the third section does not intend to make any kind of personalty bequeathable which was not bequeathable before, but only to regulate the form of executing Wills: *Bishop v. Curtis*, 18 Q. B. 878; by Lord Campbell, 881. Therefore a testator cannot bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the executor (*ib.*).

CHAPTER THE SECOND.

OF THE NATURE AND INCIDENTS OF WILLS AND CODICILS OF
PERSONAL PROPERTY.

Definition of a
Will and Testa-
ment.

A LAST Will and Testament is defined to be "the just sentence of our will, touching what we would have done after our death" (a); and in strictness, perhaps, the definition might be narrowed by adding "respecting personal estate." For a devise of *Lands* is considered by our Courts not so much in the nature of a Testament, as of a conveyance by way of appointment of particular lands to a particular devisee (b). And upon that principle it was established that a man could devise those lands only which he had at the time of the date of such conveyance, and not after purchased lands would pass, whatever words might be used (c); whereas a Will and Testament would operate upon whatever personal estate a man died possessed of, whether acquired before or since the execution of the instrument. And now by stat. 1 Vict. c. 26, s. 3, which, however, does not apply to any Will made before

(a) Swinb. Pt. 1, s. 2; Godolph. Pt. 1, c. 1, s. 2; 2 Black. Comm. 499.

(b) *Harwood v. Goodright*, Cowp. 90, by Lord Mansfield. 1 Saund. 277, *s. n.* (4) to *Duppa v. Mayo*. It is said by Lord Coke, Co. Lit. 111, *a.* that in law, most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum*, when it concerneth chattels. See also to the same effect, Godolph. Pt. 1, c. 6, s. 7.

(c) 1 Saund. 277, *s. n.* (4). Wind

v. Jekyl, 1 P. Wms. 575. It does not turn upon the construction of the statutes of Wills (32 H. VIII. c. 1, & 34 H. VIII. c. 5), which say that any person *having* lands may devise (as it has sometimes been said, see Toller on Executors, p. 2); for the same rule held before the statute, where lands were devisable by custom: *Harwood v. Goodright*, Cowp. 90, by Lord Mansfield; *Brunker v. Cook*, 11 Mod. 122; *Brydges v. Duchen*, of Chandos, 2 Ves. 427; 1 Wind. Saund. 277, *s. n.* (4).

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required by that Act
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same subsequently to

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executor," says Swinb
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Woodward v. Lord
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But although it app

(d) Pt. 1, s. 3, pl. 19.

(e) Pt. 1, c. 1, s. 2.

(f) Plowd. 185.

(g) *Wyrall v. Hall*,
Rep. 112.

(h) *Post*, Pt. I. Bk. II. C.

Jan. 1838, the power of disposing by Will executed as required by that Act is extended to all such real and personal property as the testator may be entitled to at the time of his death notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

In strictness, according to the older authorities of the ecclesiastical law, the appointment of an executor was essential to a testament. "The naming or appointment of an executor," says Swinburne (*d*), "is said to be the foundation, the substance, the head, and is indeed the true formal cause of the testament, without which a Will is no proper testament, and by the which only the Will is made a testament." So Godolphin observes (*e*), that "the appointment of an executor is the very foundation of the testament, whereof the nomination of an executor, and the *justa voluntas* of the testator, are two main essentials." And the common law judges, in *Woodward v. Lord Darcy* (*f*), laid down that "without an executor a Will is null and void." However, this strictness has long ceased to exist (*g*), as it will appear in the subsequent chapter, respecting the form and manner of making the Will (*h*). And even by the old authorities above mentioned, an instrument which would have amounted to a testament, if an executor had been nominated, was recognised as obligatory on him who had the administration of the goods of the deceased, under the appellation of a Codicil: which is accordingly defined by Swinburne (*i*) and Godolphin (*j*), to be "the just sentence of our will, touching that which we should have done after our death, *without the appointing of an executor*:" and hence a codicil was called "an unsolemn last Will" (*k*). It was termed codicil, *codicillus*, as a diminutive of a testament, *codex* (*l*).

Codicil.
Old interpretation of word.

But although it appears that "codicils" might be made by

(*d*) Pt. 1, s. 3, pl. 19.

(*e*) Pt. 1, s. 5, pl. 2.

(*f*) Pt. 1, c. 1, s. 2.

(*j*) Pt. 1, c. 6, s. 2.

(*g*) Plowd. 185.

(*k*) Swinb. Pt. 1, s. 5, pl. 4.

(*h*) Wyrall v. Hall, 2 Chanc. Rep. 112.

Godolph. Pt. 1, c. 6, s. 2.

(*l*) Godolph. Pt. 1, ch. 6, s. 1.

(*h*) Post, Pt. 1, Bk. II. Ch. II. § III.

Codicil.
Modern interpretation of word.

Of the Nature of Wills and Codicils, &c. [Pt. I. Bk. I.]

those who died without testaments (*m*), yet the more frequent use of a codicil was, as an addition made by the testator, and annexed to, and to be taken as part of a testament, being for its explanation or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator (*n*): in which sense the term codicil is applied in modern acceptance.

A codicil, in this latter sense of it, is part of the Will, all making but one testament (*o*). A strong illustration of this principle may be found in the case of *Sherer v. Bishop* (*p*), where the testator gave the residue of his personal estate among such of his relations only as were mentioned in that his Will: he afterwards made a codicil which he directed to be taken as part of his Will; and a second, by which he gave legacies to two of his relations, but gave no such direction: and it was held by Lord Commissioner Eyre (*dubitantibus* Ashhurst, J., and Wilson, J.), that as every codicil was a part of the testamentary disposition, though not part of the instrument, the relations named in the second codicil were entitled to a share of the residue (*q*). But in *Fuller v.*

(*m*) Swinb. Pt. 1, s. 5, pl. 9; Godolph. Pt. 1, c. 6, s. 3.

(*n*) Swinb. Pt. 1, s. 5, pl. 5; Godolph. Pt. 1, c. 6, s. 1.

(*o*) *Fuller v. Hooper*, 2 Ves. Sen. 242, by Lord Hardwicke.

(*p*) 4 Bro. C. C. 55.

(*q*) This decision has been considered as carrying the principle too far: and in *Hall v. Severne*, 9 Sim. 515, 518, Shadwell, V.-C., said he could not accede to it. In the latter case, the testator, by his Will, gave pecuniary legacies to several persons, and directed his residue to be divided among his before-mentioned legatees in proportion to their several legacies therein before given: By a codicil, which he directed to be taken as part of his Will, he gave several

pecuniary legacies to persons, some of whom were legatees under his Will, and declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees in addition to what he had given to them or any of them by his Will: and the V.-C. held, that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil. Where a testator devised property to the children of B. in like manner as they were entitled under the will of B., it was held that the testator referred to the Will and codicils of B., as the whole together must be taken to be his Will: *Pigott v. Wilder*, 26 Beav. 90. If a man by codicil ratifies and con-

[Ch. II.] *Of the Nature*

Hooper (*r*), where a nephew and niece desired her executor to put her handwriting as part of the will, and bequeathed the residue of her estate by a codicil she gave legacies to Lord Hardwicke held that in the subsequent part of the codicil, were excluded because the testatrix intended that the Testament, which was an instrument (*s*).

firm his last Will he ratifies it with every codicil that has been added to it, and though the Will be dated before the date of the codicil: *Green v. Tribble*, 133; *Crosbie v. Macdonald*, 139; In the goods of D. *Wye*, L. R. 3 P. & D. 100. It is not necessarily if the estate is not through want of attention otherwise has no proper effect of its own, but derives its force from the later codicil. *Newbery*, 1 C. D. 337, approving *Gordon v. Rees*, 4 Bro. C. C. 55. In the one case the question is whether the later codicil is an earlier operative one, or whether the later codicil is an earlier inoperative one, and the intention to revoke a bequest must be clear. *Pettman*, 23 C. D. 337, 338. (*r*) 2 Ves. Sen. 242, 243, approved by Bell, 333.

(*s*) So, in *Early v. Early*, 1 Coll. 354, the testator, by his Will, directed that the legacies therein before by me bequeathed should be paid free of legacy duty, and by a codicil which he directed

Hooper (r), where a person by Will gave legacies to all her nephews and nieces, *except those thereafter named*, and desired her executors to look upon all memoranda in her handwriting as parts of, or a codicil to, her Will; and then bequeathed the residue to the children of her sisters; and by a codicil she gave legacies to some other nephews and nieces; Lord Hardwicke held, that the nephews and nieces mentioned in the subsequent part of the Will, *and not those mentioned in the codicil*, were excluded from the first mentioned legacies; because the testatrix meant to refer, not to her Will or Testament, which takes in all the parts, but to the particular instrument (*s*).

When a person confirms his last Will he ratifies and confirms it with every codicil that has been added to it, and this even though the Will be described by its date: *Green v. Tribe*, 9 C. D. 231; *Crosbie v. Macdonald*, 4 Ves. 319; In the goods of *De la Sausaye*, L. R. 3 P. & D. 42; but not necessarily if the earlier codicil through want of attestation or otherwise has no proper vigour of its own, but derives its force (if at all) from the later codicil: *Burton v. Newbery*, 1 C. D. 234, disapproving *Gordon v. Reay*, 5 Sim. 274. In the one case the question is whether the later codicil revokes an earlier operative one: in the other whether the later codicil sets up an earlier inoperative one. The intention to revoke a bequest once operative must be clear: *Follett v. Pettman*, 23 C. D. 337, 343.

(*r*) 2 Ves. Sen. 242, and Supplement by Belt, 333.

(*s*) So, in *Early v. Benbow*, 2 Coll. 364, the testator, by his Will, directed that the legacies "herein before by me bequeathed" should be paid free of legacy duty: By a codicil which he directed might

be taken as part of his Will, he gave other legacies: and Knight Bruce, V.-C., held that the legacies given by the codicil were not given free of legacy duty, his Honor being of opinion that the word "herein" was meant to refer to no more than the particular instrument in which it was contained. However, several cases may be found, where an additional legacy given by a codicil, though not so expressed, has been held subject to the same incidents as the original legacy given by the Will: See *Day v. Croft*, 4 Beav. 561; *Warwick v. Hawkins*, 5 De G. & Sm. 481. See also the other decisions with respect to the legacy duty, collected *infra*, Pt. III. Bk. v. Ch. III. Where a testator executed a codicil to his last Will, and by such codicil absolutely revoked and made void all bequests and dispositions in the Will and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the Will, it was held by Lord Penzance that the Will was not revoked: In the goods of *Howard*, L. R. 1 P. & D. 636.

A Will is different in its nature from a deed :

in all cases revocable :

there cannot be a joint Will.

A Will is in its nature a different thing from a deed, and although the testator happen to execute it with the formalities of a deed ; *e.g.*, though he should seal it, which is no part or ingredient of a Will ; yet it cannot in such case be considered as a deed (*t*).

It is also a peculiar property in a Will, as it will hereafter more fully appear, that by its nature it is in all cases a revocable instrument, even should it in terms be made irrevocable (*u*) ; for it is truly said, that the first grant and the last Will is of the greatest force (*v*).

Another essential difference between a Will and a deed may be mentioned, that there cannot be a conjoint or mutual Will : an instrument of such a nature is unknown to the testamentary law of this country (*x*). But there are several authorities which appear to show that this doctrine does not go further than to deny that a conjoint or mutual Will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the joint or mutual testators. Such a Will is certainly revocable (*y*). But if either of the testators die without revoking it, the Will is valid and entitled to probate as far as respects his property (*z*). Where, however, two testators made a joint Will containing devises and legacies to take effect after the decease of both of them, it was held that probate could not be granted of the Will during the lifetime of either (*a*).

(*t*) Lord Darlington *v.* Pulteney, 1 Cowp. 260. Attorney-General *v.* Jones, 3 Price, 368. See *post*, Pt. I. Bk. II. Ch. II. § III., as to what instruments are testamentary.

(*u*) Vynior's case, 8 Co. 82 *a*. See *post*, Pt. I. Bk. II. Ch. III.

(*v*) Co. Lit. 112 *b*.

(*x*) 1 Cowp. 268, in Lord Mansfield's judgment. *Hobson v. Blackburn*, 1 Add. 277 : but see *post*, Pt. I. Bk. II. Ch. III., as to the validity of such a Will in Equity.

(*y*) But see *post*, Pt. I. Bk. II. Ch. III., as to the irrevocability of such a Will in Equity.

(*z*) In the goods of Stracey, Da. & Sw. 6. In the goods of Lovegrove, 2 Sw. & Tr. 453.

(*a*) In the goods of Raine, 1 Sw. & Tr. 144, *coram* Sir C. Cresswell. But *quære*, whether the delay of the effect of the Will interfered with its title to immediate probate as the Will of the deceased testator.

OF THE MAKING,

WHO IS CAPABLE

IT may be laid down as a general rule, that a person is not competent to dispose of his property by will, unless he has sufficient discretion to do so. It has been held, that a person who has been guilty of certain crimes, is not competent to dispose of his property by will, on the grounds of incapacity ; 2, the want of sufficient discretion to conduct the property.

This may be the case, where the person does not come, in strictness, within the definition of an alien. Formerly alien friends, with ours, might not dispose of their estate (although by will they were of course competent), unless they had been naturalized, or had resided in the country for a certain period, and had then taken the oath of allegiance. But now, by the Naturalization Act, every description of alien, whether composed of by an alien or a natural-born British subject, is competent to dispose of his property by will.

(*a*) Swinb. Pt. 2, s. 1. (b) Wentw. c. 1, p. 1. (c) Vin. Abr. Dev. Bac. Abr. Wills, B. 17.

(*e*) But it is provided

BOOK THE SECOND.

OF THE MAKING, REVOCATION AND REPUBLICATION OF WILLS OF PERSONAL ESTATE.

CHAPTER THE FIRST.

WHO IS CAPABLE OF MAKING A WILL OF PERSONALTY.

IT may be laid down generally, that all persons are capable of disposing of their personal estate by testament, who have sufficient discretion, their own free will, and who have not been guilty of certain offences (*a*). Wherefore there are three grounds of incapacity; 1, the want of sufficient legal discretion; 2, the want of liberty or free will; 3, the criminal conduct of the party.

This may be the proper place to mention two cases which do not come, in strictness, under any one of these heads. Formerly alien friends, or such whose countries were at peace with ours, might make Wills to dispose of their personal estate (although being incapable of holding real property, they were of course equally so of devising it); but alien enemies, unless they had the king's licence, express or implied, to reside in this country, were incapable of making any testamentary disposition of their property (*b*). Now by sec. 2 of the Naturalization Act, 1870, real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject (*c*). But although the words

Aliens.

33 & 34 Vict.
c. 14.

(a) Swinb. Pt. 2, s. 1.

(b) Wentw. c. 1, p. 35, 14th edit.; Vin. Abr. Devise, G. 17; Bac. Abr. Wills, B. 17.

(c) But it is provided by sub-

sect. 2 of sect. 2, "that this sect. shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either me-

Capacity to make a Will—The King. [Pt. I. Bk. II.]

"disposed of by an alien in the same manner in all respects as a natural-born British subject" include a disposition by Will, they do not affect the form of the Will nor enable a foreigner to make a Will which is not in conformity with the law of his own country: and such a Will executed abroad according to the formalities required by English Law is invalid, notwithstanding the provisions of the Naturalization Act, 1870 (*d*).

The King or
Queen.

With respect to the power of the reigning Sovereign to make a Will of his or her personal property;—it appears by the Rolls of Parliament, that in the sixteenth year of King Richard the Second the Bishops, Lords and Commons, assented in full Parliament, that the king, his heirs and successors, might lawfully make their testaments (*e*). And the statute 39 & 40 George III. c. 88, s. 10, enacts, "that all such personal estate of his Majesty, and his successors respectively, as shall consist of monies which may be issued or applied for the use of his or their privy purse, or monies not appropriated to any public service, or goods, chattels or effects, which have not or shall not come to his Majesty or shall not come to his successors respectively, with or in right of the crown of this realm, shall be deemed and taken to be personal estate and effects of his Majesty and his successors respectively, subject to disposition by last Will and Testament, and that such last Will and Testament shall be in writing, under the sign manual of his Majesty and his successors respectively, or otherwise shall not be valid; and that all and singular the personal estate and effects whereto or whereunto his Majesty or any of his successors shall be

diately or immediately in possession or expectancy in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act."

(*d*) In the goods of Von Buseck, 6 P. D. 211. See also Bloxam v. Favre, 8 P. D. 101; 9 P. D. 130.

(*e*) 4 Instit. 335. Whether kings and sovereign princes can make their testaments, says Godolphin (Pt. 1, c. 7, s. 4), is resolved in the affirmative; but of what things, is such a *questio statuta*, as is safest resolved by a *noli me tangere*. See also Swinb. Pt. 2, s. 27.

[Ch. I.] *Of the C*

possessed or entitled to, demises, subject to the said, shall be liable to be properly payable subject thereto, the Majesty and his successors respectively as shall be of as aforesaid, shall the demise of his Majesty the same would have

But it should seem to grant any probate. On one occasion (f) the Court of Chancery, the Proctor of his Majesty, an alleged testament of George III. proposed the application, on which was prayed, and a decree being Sovereign; concerning action or suit, even the king: The learned of his judgment, of Sovereigns, from the present day examined; but no instance having taken probate of the Sovereign's Will has

(f) In the goods of Majesty George III., 1

(g) One single instance in the Rolls of Parliament, like a reference to the dictum in respect of a in the 1st of Henry V. that Henry IV. having a Will, and appointed thereof, those executors the assets would be in

possessed or entitled at the time of his and their respective demises, subject to such testamentary disposition as aforesaid, shall be liable to the payment of all such debts as shall be properly payable out of his or their privy purse, and that subject thereto, the same personal estate and effects of his Majesty and his successors respectively, or so much thereof respectively as shall not be given or bequeathed or disposed of as aforesaid, shall go in such and the same manner, on the demise of his Majesty and his successors respectively, as the same would have gone if this Act had not been made."

But it should seem that the Court has no jurisdiction to grant any probate of the Will of a deceased Sovereign. On one occasion (*f*), an application was made to the Prerogative Court of Canterbury for its process, calling on the Proctor of his Majesty, King George IV., to see and hear an alleged testamentary paper of his late Majesty King George III. propounded and proved: but the Court refused the application, on the ground that in substance the process was prayed, and a demand adversely made, against the reigning Sovereign; contrary to the established doctrine, that no action or suit, even in civil matters, can be brought against the king: The learned judge, Sir John Nicholl, in the course of his judgment, observed, that the history of the Wills of Sovereigns, from Saxon times, from Alfred the Great down to the present day, had been diligently searched and examined; but no instance had been produced of any Sovereign having taken probate in the Archbishop's Court, or of any Sovereign's Will having been proved there (*g*); nor any in-

(*f*) In the goods of his late Majesty George III., 1 Add. 255.

(*g*) One single instance occurs in the Rolls of Parliament of something like a reference to this jurisdiction in respect of a royal Will. In the 1st of Henry V. it is stated, that Henry IV. having made a Will, and appointed executors thereof, those executors, fearing the assets would be insufficient,

declined to act. It is then recited that under these circumstances the effects would be at the disposal of the Archbishop of Canterbury as Ordinary, who should direct them to be sold. But Henry V., instead of allowing the effects to be sold, took to them, and agreed to pay their appraised value: 1 Add. 263; 4 Inst. 333. The only Will of a sovereign deposited in the

stance of any successor of any intestate Sovereign coming to the Court for letters of administration; which the learned judge considered as furnishing decisive evidence that the Court had no jurisdiction whatever therein (*h*). This decision was subsequently approved and acted on by Sir Cresswell Cresswell (*i*).

SECTION I.

Persons incapable from want of Discretion.

Infants.

In this class are to be reckoned infants, with respect to whom it is enacted by stat. 1 Vict. c. 26, s. 7, which, however, does not apply to Wills made before 1 Jan., 1838, "that no Will made by any person under the age of twenty-one years shall be valid."

Idiots.

An idiot, that is, a fool or madman from his nativity who never has any lucid intervals (*k*), is incapable of making a Will. Such a one is described to be a person who cannot number twenty, tell the days of the week, does not know his own father or mother, his own age, &c. (*l*). But these, though they may be evidences, yet they are too narrow, and conclude not always (*m*): for whether idiot or not is clearly a question of fact referrible to the individual circumstances of each particular case. If an idiot should make his testament so well and wisely in appearance that the same may seem rather to be made by a reasonable man than by one void of discretion, yet this testament is void in law (*n*).

Deaf and dumb.

One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making

registry of the Prerogative Court is the Will of Henry VIII. That is understood to be a copy merely, and there is no appearance of any probate of it having been taken. It was probably deposited there for safe custody, or as a place of notoriety for such a purpose: 1 Add. 263.

(*h*) 1 Add. 262, 264, 265.

(*i*) In the goods of his late

Majesty Geo. III., 3 Sw. & Tr. 199.

(*k*) 1 Hale, P. C. 29. Bac. Abr. Idiots, &c. A. 1. Beverley's Case, 4 Co. 124 *b*.

(*l*) 1 Hale, P. C. 29. Bac. Abr. Idiots, &c. A. Swinb. Pt. 2, s. 4.

(*m*) 1 Hale, P. C. 29.

(*n*) Swinb. Pt. 4, s. 4, pl. 5, 7. Bac. Abr. Wills, B. 12.

a Will; but such sufficiently appears means, and has a d and tokens declare and dumb by nature if by some accident his tongue, then in with his own hand But if he be not able those which be bot have un...standing otherwise not at all they may make their and hear, whether t. Such as be speechless can write, may very writing: if they cannot by signs, so t to such as then be p It is laid down in Law, that although testament (*l*), by dec of witnesses; yet writing, unless the

(*o*) Swinb. Pt. 2, s. Godolph. Pt. 1, c. 11.

L. 60. See also Dic Blisset, 1 Dick. 268; Judgment of Wood, V. v. Harrod, 1 Kay Where a testator, who and dumb, made his W communicating his testam instructions to an acquai signs and motions, who Will in conformity with instructions, which was duly executed by the te Court required an affi the drawer of the Will,

a Will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament (o). One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then in case he shall be able to write, he may with his own hand write his last Will and Testament (p). But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, i.e., if he have un-derstanding he may make his testament by signs, otherwise not at all (q). Such as can speak and cannot hear, they may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise (r). Such as be speechless only, and not void of hearing, if they can write, may very well make their testament themselves by writing: if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present (s).

It is laid down in the old Text Books of the Ecclesiastical Law, that although he that is blind may make a nuncupative testament (t), by declaring his Will before a sufficient number of witnesses; yet that he cannot make his testament in writing, unless the same be read before witnesses, and in

(o) Swinb. Pt. 2, s. 4, pl. 2. Godolph. Pt. 1, c. 11. 4 Burn, E. L. 60. See also *Dickenson v. Blisset*, 1 Dick. 268; and the judgment of Wood, V. C., in *Harrod v. Harrod*, 1 Kay & J. 4, 9. Where a testator, who was deaf and dumb, made his Will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a Will in conformity with such instructions, which was afterwards duly executed by the testator, the Court required an affidavit from the drawer of the Will, stating the

nature of the signs and motions by which the instructions were communicated to him: In the goods of *Owston*, 2 Sw. & Tr. 461. In the goods of *Geale*, 3 Sw. & Tr. 431.

(p) Swinb. Pt. 2, s. 10, pl. 2; Godolph. Pt. 1, c. 11.

(q) Swinb. Pt. 2, s. 10, pl. 2; Godolph. Pt. 1, c. 11.

(r) *Ibid.*

(s) Swinb. Pt. 2, s. 10, pl. 4; Godolph. Pt. 1, c. 11.

(t) See *post*, Chap. II. § VI. as to the restrictions on nuncupative Wills.

their presence acknowledged by the testator for his last Will (u): And that, therefore, if a writing be delivered to the testator, and he not hearing the same read, acknowledged the same for his Will, this would not be sufficient; for it may be that if he should hear the same he would not own it (x). And the Civil Law expressly required that the Will should be read over to the testator, and approved by him, in the presence of all the subscribing witnesses. But in England this strictness is not required, and it is sufficient if there is satisfactory proof before the Court of the testator's knowledge and approval of the contents of the Will which he executed (y): And it is not necessary to produce evidence that the identical paper, which the testator executed as his Will, was ever read over to him (z).

Persons who
cannot read.

And what precautions are necessary for authenticating a blind man's Will, seem in like degree requisite in the case of a person who cannot read. For though the law in other cases may presume, that the person who executes a Will knows and approves of the contents thereof; yet that presumption ceases, where by defect of education, he cannot read or by sickness he is incapacitated to read the Will at that time (a).

Lunatic.

A lunatic, that is, a person usually mad, but having intervals of reason (b), during the time of his insanity, cannot make a testament, nor dispose of anything by Will (c). And "so strong is this impediment of insanity of mind, that if the testator make his testament, after his *furor* has overtaken him, and while as yet he possesses his mind, although the

(u) Swinb. Pt. 2, s. 11; Godolph. Pt. 1, c. 11.

(x) *Ibid.* See also Barton v. Robins, 3 Phillim. 455, n. (b).

(y) 4 Burn. E. L. 60; Moore v. Paine, 2 Cas. temp. Lee, 595. See also Re Axford, 1 Sw. & Tr. 540. The single oath of the writer has been allowed sufficient by the Court of Delegates to prove the identity of the Will: *Ibid.*

(z) Fincham v. Edwards, 3 Curt. 63: affirmed on appeal, 4 Moo. P. C. 198. See also Longchamp v. Fish, 2 Bos. & Pull. N. R. 413.

(a) 4 Burn. E. L., p. 61; Barton v. Robins, 3 Phillim. 455, n. (b). See post, Pt. I. Bk. iv. Ch. III. § 7.

(b) Beverley's case, 4 Co. 124 b.

(c) Swinb. Pt. 2, s. 3; Godolph. Pt. 1, c. 8, s. 2.

furor after departing from understanding, yet the former fit recover a

If a party impeached on supposed incapacity, dependent on such party, and most satisfactory upon the person at issue purports to be a legatee, the contrary is shown by insanity at the time of the commission of suicide, the instrument by which the testament (h).

But it must be known that insanity is not to be taken at most, as a mixed presumption, but a mere presumption of law, by a jury from the fact that the testator did not enjoy his mind, to be the general conclusion, more, a Will is proved, and no other evidence properly told that the party opposing testamentary competency, the jury may give belief in the competency of the Will. And in each

(d) Swinb. Pt. 2, s. 3; Godolph. Pt. 1, c. 8, s. 2. Will is not revoked by subsequent insanity of the testator. Swin. Pt. 11, s. 3, pl. 1, b. Post, Pt. I. Bk. iv. Ch. III. § 7.

(e) The law seems uncertain as to how far, in cases of insanity of mind, a

furor after departing or ceasing, the testator recover his former understanding, yet does not the testament made during his former fit recover any force or strength thereby" (d).

If a party impeach the validity of a Will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs (e). The burthen of proof rests upon the person attempting to invalidate what, on its face, purports to be a legal act (f). Sanity must be presumed till the contrary is shown (g). Hence, if there is no evidence of insanity at the time of giving the instructions for a Will, the commission of suicide, three days after, will not invalidate the instrument by raising an inference of previous derangement (h).

But it must be borne in mind, that the presumption of sanity is not to be treated as a legal presumption, but, at the utmost, as a mixed presumption of law and fact (if not as a mere presumption of fact), that is, an inference to be made by a jury from the absence of evidence to show that the testator did not enjoy that soundness which experience shows to be the general condition of the human mind. If, therefore, a Will is produced before a jury and its execution proved, and no other evidence is offered, the jury would be properly told that they ought to find for the Will. And if the party opposing the Will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the Will. And in each case, the presumption of competency

Presumption
of sanity.

(d) Swinb. Pt. 2, s. 3, pl. 2; Rodolph. Pt. 1, c. 8, s. 2. But a Will is not revoked by the subsequent insanity of the testator:

(e) Swin. Pt. 11, s. 3, pl. 3; 4 Co. l. b. *Post*, Pt. I. Bk. II. Ch. III. 434.

(f) *Groom v. Thomas*, 2 Hagg. 434.

(g) *Burrows v. Burrows*, 1 Hagg. 109. See also *Hoby v. Hoby*, 1 Hagg. 146.

(h) The law seems unsettled as to how far, in cases of alleged unsoundness of mind, hereditary

constitutional insanity may be pleaded: *Frere v. Peacocke*, 3 Curt. 664.

(f) 2 Phill. Ev. 293, 7th edit.

(g) *Groom v. Thomas*, 2 Hagg. 434.

(h) *Burrows v. Burrows*, 1 Hagg. 109. See also *Hoby v. Hoby*, 1 Hagg. 146.

would prevail. Still, the *onus probandi* lies, in every case, on the party relying on a Will, and he must satisfy the jury that it is the Will of a capable testator (i) : and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the Will is the Will of a competent testator, they ought not to affirm by their verdict that it is so. Accordingly, where, in an action by heir-at-law against devisees,—the question in issue being as to the capacity of the testator to make a Will,—the judge in his summing up told the jury “that the heir-at-law was entitled to recover unless a Will was proved, but that, when a Will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator, and that if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendants.” This was held to be a misdirection (k).

Will made during a lucid interval :

transfer in such case of *onus probandi*.

If a lunatic person have clear or calm intermissions (usually called lucid intervals), then during the time of such quietness and freedom of mind, he may make his testament, appointing executors, and disposing of his goods at pleasure (l). “If you can establish,” said Sir Wm. Wynne, in the case of *Cartwright v. Cartwright* (m), “that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption; for until proof of an habitual

(i) And *a fortiori* when it appears that the testator was subject to delusions : *Smee v. Smee*, 5 P. D. 84.

(k) *Sutton v. Sadler*, 3 C. B. (N. S.) 87. See also *Accord. Symes v. Green*, 1 Sw. & Tr. 401. As to the onus of showing sanity at the time of mutilation, in order to set up a revocation, see *Harris*

v. Berrall, 1 Sw. & Tr. 153; post p. 36.

(l) *Swinb. Pt. 2*, s. 3, pl. 3. *Gedolph. Pt. 1*, c. 8, s. 2. *Wentw. c. 1*, p. 33, 14th ed. *Hall v. Warren*, 9 Ves. 610. *Rodd v. Lewis*, Cas. temp. Lee, 176.

(m) 1 *Phillim. Rep.* 100. See the particulars of this case, post p. 18.

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But although t intervals as valid, impressed with th observed in exam and such proof is r other reasons, viz rational to all outw of his malady (p). subject to attacks at other times in f attacks may natura him when subject t incapacity. These the apparent contr for the Court to rel the grounds upon guided in its own done, rather than b

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insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity of the mind of the person who does the act, is established, there the party who would take advantage of an interval of reason must prove it" (n).

But although the law recognises acts done during such intervals as valid, yet it is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval (o); and such proof is matter of extreme difficulty, for this, among other reasons, viz., that the patient is, not unfrequently, rational to all outward appearance without any real abatement of his malady (p). On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happen to see him when subject to them, a strong opinion of his permanent incapacity. These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the Court to rely but little upon mere opinion, to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgments of others (q).

What is sufficient proof of a lucid interval

In *Ex parte Holyland* (r), Lord Eldon observed, that in the case of the *Attorney-General v. Parnter*, "Lord Thurlow

(n) See also the same doctrine laid down by Lord Thurlow in *Attorney-General v. Parnter*, 3 Bro. C. C. 443, and Sir W. Grant in *Hall v. Warren*, 9 Ves. 611. See also Swinb. Pt. 2, s. 3, pl. 7, where it is said, that if it be proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. See also Rodolph. Pt. 1, c. 8, s. 2. But where the attesting witnesses, disinterested medical men, speak strongly to sanity, the Court will

not set aside a Will on proof by interrogatories, but without plea, that the deceased many years before had been under an insane delusion: *Kemble v. Church*, 3 Hagg. 273.

(o) By Sir John Nicholl in *White v. Driver*, 1 Phillim. Rep. 28.

(p) By Sir John Nicholl in *Brogden v. Brown*, 2 Add. 446, and in *Ayrey v. Hill*, 2 Add. 210.

(q) By Sir John Nicholl in *Kindleside v. Harrison*, 2 Phillim. Rep. 459.

(r) 11 Ves. 11.

said that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property or with reference to such a case as this; for suppose the strongest mind reduced by the delirium of a fever or any other cause, to a very inferior degree of capacity, admitting of making a Will of personal estate (to which a boy of the age of fourteen is competent), the conclusion is not just that as that person is not what he had been, he should not be allowed to make a Will of personal estate." It must be observed that Sir W. Grant, in *Hall v. Warren* (s), does not appear to have understood Lord Thurlow in the same sense as Lord Eldon did in the preceding remarks, nor indeed does the report in *Brown of the Attorney-General v. Partridge* bear any such construction. "If general lunacy," said Sir W. Grant, "is established, they will be under the necessity of showing, according to the *Attorney-General v. Partridge*, that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act."

Proof of lucid interval arising from the act of making a rational Will.

In the case of *Cartwright v. Cartwright* (t), it appeared that the testatrix was early in life afflicted with the disorder of her mind. She afterwards was supposed to be perfectly recovered, and continued for several years to conduct a house and establishment of her own as a rational person; but her habit and condition of body, and her manner for several months before the date of her Will, were those of a person afflicted with many of the worst symptoms of insanity, and continued so after making the Will. She was attended by Dr. Battie, who desired the nurse and other servants to prevent her from reading and writing, as such occupation might disturb her head, and in consequence thereof she was for some time kept from the use of books and writing materials. However, some time prior to writing the Will, she

(s) 9 Ver. 611.

(t) 1 Phillim. 80.

became very imp frequently asked Battie, in order to should have them it did not signify make any proper given permission, and her hands, wh tied, were let loose sired her nurse an They went into an she wrote upon sev and furious manne the first time after a room many times i to herself, she wro month, and an a nurses, and the da a candle to seal th her for that purp cautious not to tru hold it at a distar The survivor of the that, in her opini capacity to be able the time she was co hour, she by her insanity. The Will and without a blot it was a proper an her affections were and trustees were after this writing mother of the par mentioned that she servant to bring it, observing that there

became very importunate for the use of pen and paper, and frequently asked for them in a very clamorous manner. Dr. Battie, in order to quiet and gratify her, consented that she should have them, telling her nurse and another servant that it did not signify what she might write, as she was not fit to make any proper use of them. As soon as Dr. Battie had given permission, pen, ink, and paper were carried to her, and her hands, which had been for some time kept constantly tied, were let loose, and she sat down at her bureau and desired her nurse and servant to leave her alone while she wrote. They went into an adjoining room and watched her. At first she wrote upon several pieces of paper, and got up in a wild and furious manner and tore the papers and threw them into the fire one after another. After walking up and down the room many times in a wild and disordered manner, muttering to herself, she wrote the Will. She inquired the day of the month, and an almanack was given to her by one of the nurses, and the day pointed out to her. She then called for a candle to seal the paper, which was given to and used by her for that purpose, although they used generally to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper. The survivor of the two witnesses to the transaction deposed that, in her opinion, the testatrix had not then sufficient capacity to be able to know what she did, and that during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures showed many signs of insanity. The Will was written in a remarkably fair hand, and without a blot or mistake in a single word or letter: *and it was a proper and natural Will, and conformable to what her affections were proved to be at the time, and her executors and trustees were very discreetly appointed.* Two months after this writing of the Will, in a conversation with the mother of the parties benefited by the Will, the testatrix mentioned that she had made such a Will, and ordered her servant to bring it, and she then delivered it to the mother, observing that there was no need of witnesses as the estate

was all personal, and the Will in her own handwriting. Sir Wm. Wynne pronounced the Will to be the legal Will of the deceased, and further said, that in his apprehension the forming of the plan, and pursuing and carrying it into effect with propriety and without assistance, would have been sufficient to have established an interval of reason if there had been no other evidence; but it was further affirmed, by the recognition and the delivery of the Will. From this sentence an appeal was interposed to the High Court of Delegates—who affirmed the judgment of Sir Wm. Wynne (u). That very eminent judge, in the course of giving sentence below, after remarking that the Court did not depend on the opinions of the witnesses, but on the facts to which they deposed, delivered the following observations:

"The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the Will. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act, rationally done (v). In my apprehension, where you are able completely to establish that, the law does not require you to

(u) 1 Phillim. 122.

(v) It is not, however, to be supposed that the learned judge here considers that every rational act rationally done is sufficient to prove a lucid interval. It is the particular manner in which the act was done in this case which leads the judge to the conclusion that there was a lucid interval: 2 Curt. 447, by Sir H. Jenner Fust, in *Chambers v. The Queen's Proctor*. In *Bannatyne v. Bannatyne*, 2 Roberts. 472, 501, Dr. Lushing-

ton, referring to the above passage in the judgment of Sir W. Wynne, said, "Though I cannot say I altogether agree to that dictum, still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, 'the strongest and best proof' of a lucid interval, does contribute to the establishment of it." See also the observations of Sir C. Creswell, in *Nicholls v. Binns*, 1 Sw. & Tr. 239.

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(w) Swinh. Pt. 2, p. 3

(x) 1 Add. 10.

go further; and the citation from Swinburne states it to be so. The manner he has laid it down is (it is in the part in which he treats of what persons may make a Will) (*w*): 'The last observation is, If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his clear and calm intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably there must be a complete and absolute proof that the party who had so formed it did it without any assistance. If the fact be so, that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentleman could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact, that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." Accordingly, Sir John Nicholl, in *Scruby v. Fordham* (*x*), lays it down as a general rule, that where a Will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the Will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character, broadly taken, of his act (*y*).

(*w*) Swinb. Pt. 2, s. 3, pl. 14.

(*x*) 1 Add. 10.

(*y*) See also *Chambers v. Queen's Proctor*, 2 Curt. 415, 451, Accord.

In the case of *M'Adam v. Walker* (z), Lord Chancellor Eldon mentioned that he had been concerned as counsel, in a cause where a gentleman who had been for some time insane, and who had been confined till the hour of his death in a madhouse, had made a Will while so confined. The question was, whether he was of sound mind at the time of making this testament. It was a Will of large contents, proportioning the different divisions with the most prudent and proper care, with a due regard to what he had previously done to the objects of his bounty, and in every respect pursuant to what he had declared, before his malady, he intended to have done. It was held, that he was of sound mind at the time.

In the cases above stated, the act was not only done and completed by the testator himself, but the Will was proper and natural. In another case, *Clarke v. Lear and Scarwell* (a), where the instrument, although written with great accuracy by the testator himself, was made in favour of a person to whom he had no good cause whatever to give a benefit, it was held that the act of framing such an instrument furnished no proof of the existence of a lucid interval. That was the case of a man who had been certainly disordered in his mind for a length of time. He went to Little Hampton to bathe in the sea, and there he saw a young woman at the house where he boarded, of whom he had no prior knowledge, and wanted to marry her, at a time when he was insane; and being brought to London in a strait waistcoat, he there wrote a paper, by way of codicil, giving her a legacy (b).

Distinction, as
to proof of

With respect to the comparative facility of proving a lucid

See also the address of Sir C. Cresswell to the jury in *Nicholls v. Binns*, 1 Sw. & Tr. 239.

(z) 1 Dow. 178.

(a) March, 1791, cited in 1 Phillim. 119, by Sir Wm. Wynne.

(b) See also the observations of Sir J. Nicholl, in *Evans v. Knight*, 1 Add. 237, 238; and for further cases as to the proof of the exist-

ence of lucid intervals, at the time of doing testamentary acts, see *Attorney-General v. Parnter*, 3 Bro. C. C. 441; *Coghlan v. Coghlan*, cited in 1 Phillim. 120; *Williams v. Goude*, 1 Hagg. 577; *Borlase v. Borlase*, 4 Notes of Cases, 106; and Lord Brougham's observations in *Waring v. Waring*, 4 Moo. P. C. 351.

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(e) 1 Add. 279; 3 Ad

interval, there is a great distinction to be observed, with respect to a case of delirium, set up in opposition to a Will, as contradistinguished from fixed mental derangement, or permanent proper insanity. The reason for this is given with peculiar force and precision of language, by Sir John Nicholl, in *Brogden v. Brown* (c). "In cases of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, as the Court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not unfrequently rational to all outward appearance, without any real abatement of his malady: so that, in truth and substance, he is just as insane, in his apparently rational as he is in his visible raving fits. But the apparently rational intervals of persons, merely delirious, for the most part are really such. Delirium is a fluctuating state of mind, created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is, most commonly, really sane. Hence, as also, indeed, from their greater presumed frequency in most instances in cases of delirium, the probabilities, *à priori*, in favour of a lucid interval are infinitely stronger in a case of delirium, than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held by this Court" (d).

lucid interval
between
delirium and
insanity.

The great case of *Dew v. Clark* (e), which obtained the most complete and solemn consideration, led to a full investigation of that which has often been called "Partial Insanity," but which would, perhaps, be better described by the phrase "insanity, or unsoundness, always existing, although only occasionally manifest" (f). There the case pleaded by an only daughter in a responsive allegation, in the Prerogative

Partial insanity.

Dew v. Clark.

(c) 2 Add. 445.

(d) See also the observations of Dr. Lushington in *Dimes v. Dimes*, 10 Moo. P. C. 422, 426.

(e) 1 Add. 279; 3 Add. 79. See

also Dr. Haggard's Report from the judge's notes.

(f) 6 Moo. P. C. 350, by Lord Brougham.

Court, in opposition to her father's Will, was, that besides labouring under mental perversion in some other particulars, especially on religious subjects, the deceased had an *insane* aversion to his daughter, and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be conveyed by the contested Will. This allegation was opposed, as inadmissible, on behalf of residuary legatees named in the Will. But Sir John Nicholl admitted it; and after remarking that the case set up was one of partial insanity—of insanity *quod hoc*, upon a particular subject, or rather, perhaps *quod hanc*, as to a particular person,—and that the possible occurrence of such a case of partial insanity, and the consequent invalidity of a Will, which is fairly presumable to have been made under its operation, must be admitted on the authority of *Greenwood's case* (g); the learned judge proceeded to observe, with respect to the daughter, “She must be apprised, however, as well that the burthen of proof rests with her, as that this burthen, in my judgment, is from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out than *Greenwood's case*, in one respect, as the delusion under which the deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject

(g) The following statement of this case is to be found in Lord Erskine's speech on the trial of Hadfield: “The deceased, Mr. Greenwood, whilst insane took up an idea that his brother had administered poison to him, and this became the prominent feature of his insanity. In a few months, however, he recovered his senses, and returned to his profession, which was that of a barrister, &c., but could never divest his mind of the morbid delusion that his brother had attempted to poison

him; under the influence of which (so said) he disinherited him. On a trial in the Court of King's Bench upon an issue *devisavit vel non*, the jury found against the Will: but a contrary verdict was had in the Court of Common Pleas: and the suit ended in a compromise.” See also Sir John Nicholl's statement of *Greenwood's case*, 3 Add. 96, 97, and Lord Eldon's in *White v. Wilson*, 13 Ves. 89, and the summing up of Lord Kenyon in 3 Curt. Appendix, pp. 1—xxx.

of religion; although the general capacity must understand sudden bursts of violent natural feeling, meaning she can only prove clearly resolvable in that the deceased had general sanity” (h) thorough on both sides judgment: that the qualified offspring (i) and conduct of the morbid delusion put be considered insane consequently that the In the course of his following remarks, he said that ‘partial insanity’ observation could only in which the Court a person could be a moment of time: the sound; otherwise it that the delusion must

subjects. In that less an authority the partial insanity of m

(h) 1 Add. 284. See *Black v. Allinson*, 3 Hag.

(i) It must, however, be observed that the rule of law in civil suits, it is not necessary to make or connect the morbid delusion with the act itself. If the mind is unsound, the law avoids every transaction during the period of insanity, although the

of religion; although here, as in *Greenwood's* case, the general capacity is, in substance, unimpeached. But she must understand that no course of harsh treatment—no sudden bursts of violence—no display of unkind, or even unnatural feeling, merely, can avail in proof of her allegation—she can only prove it by making out a case of antipathy clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity" (h). After the evidence had been gone through on both sides, the same learned judge delivered his judgment: that the Will being proved to be the direct unqualified offspring (i) of a morbid delusion, as to the character and conduct of the daughter, being the very creature of that morbid delusion put into act and energy, the deceased must be considered insane at the time of making the Will, and consequently that the Will itself was null and void in law (k). In the course of his judgment the learned judge made the following remarks, on the subject of partial insanity: "It was said that 'partial insanity' was unknown to the law. The observation could only have arisen from mistaking the sense in which the Court used that term. It was not meant that a person could be partially insane and sane at the same moment of time: to be sane, the mind must be perfectly sound; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects. In that sense, the very same term is used by no less an authority than Lord Hale, who says, 'There is a partial insanity of mind and a total insanity. The former is

What is meant by partial insanity.

(h) 1 Add. 284. See also *Fulbeck v. Allinson*, 3 Hagg. 527.

(i) It must, however, be observed that the rule of law is that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic during the period of the lunacy, although the act to be

avoided cannot be connected with the influence of the insanity, and may be proper in itself: *Groom v. Thomas*, 2 Hagg. 436.

(k) 3 Add. 208. This judgment was afterwards confirmed by the Court of Delegates. A commission of review was then applied for before the Lord Chancellor, but refused. See 5 Russ. Chan. Cas. 163.

either in respect to things *quod hoc vel illud insanire*. Some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications. Or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless, most persons that are felons of themselves, and others, are under a degree of partial insanity, when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes" (b).

(b) Dr. Haggard's Report from the judge's notes, pp. 11, 12. The Lord Chancellor (Lyndhurst), on refusing a commission of review, thus commented upon the judgment of Sir John Nicholl:—

"In this case I do not find any error in law: I do not find any doubtful or important question of law, which requires to be decided in any solemn form. The only point of law which has been agitated has arisen out of an expression made use of by the learned judge in the Court below. He speaks of *partial insanity*; and it was contended at the bar, that a case of partial insanity would not be a sufficient ground to lead a Court to set aside, or to justify a Court in setting aside a Will; and that the doctrine of partial insanity is not known to the law

of England. I think I am stating correctly the argument of counsel with respect to this point, according to the apprehension which I entertain of it, at the time when the term *partial insanity* was reiterated, over and over again, as expressing the ground of Sir John Nicholl's judgment. But I think the argument, founded upon that phrase, proceeds upon a misapprehension of what was meant by the learned judge who occasionally used it. I have read his judgment with great attention, and I collect from it that his meaning is that there must be unsoundness of mind in order to invalidate a Will; but that the unsoundness may be evidenced in reference to one or more subjects. 'It seldom happens,' he says, 'that a person who is insane, displays that insanity

These doctrines. It has been more generally, were fully established by Lord Brougham in the Privy Council in *Wicks*, demonstrating that for any act, of a diseased person, that act may appear to be sane. I observe, that "we are not to say; we should say that it requires a reference to the facts which appears not. But the same and the same sound, and really is not on, are only the accordingly, it was how unsoundness of mind in general; it was sufficient points, though in all

with reference to every subject; it should be with reference to particular subjects, and sometimes with reference to only one individual; it sometimes displays with reference to one subject, and very generally, with reference to other subjects. All that the learned judge meant to convey was, that the objection to the imputation of unsoundness, that it may be only, or principally, in reference to one particular subject, one particular person: he illustrates his position by several cases, some of them notorious and known to the construction does not follow from general reasoning, the purpose of avoiding

These doctrines, and the subject of "Partial Insanity" (or, as it has been more usually called of late, "Monomania,") generally, were fully commented on and explained with great ability by Lord Brougham, in delivering the opinion of the Privy Council in *Waring v. Waring* (m). His Lordship, after demonstrating that no confidence can be placed in the acts, or any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be, proceeded to observe, that "we are wrong in speaking of partial unsoundness; we should say that the unsoundness always exists, but requires a reference to a peculiar topic, else it lurks and appears not. But the malady is there; and as the mind is one and the same it is really diseased, while apparently sound, and really its acts whatever appearances they may put on, are only the acts of a morbid or unsound mind." Accordingly, it was an established principle of law, that to show unsoundness of mind it was not required that it should be general; it was sufficient if proved to exist on one or more points, though in all other respects the man might conduct

with reference to every question and every subject; it shows itself with reference to particular subjects, and sometimes with reference to only one individual subject; it sometimes displays itself with reference to one subject very decidedly, and very generally, perhaps, with reference to other subjects. All that the learned judge meant to convey was, that it was no objection to the imputation of unsoundness, that it manifested itself only, or principally, with reference to one particular question or one particular person: and he illustrates his position by a variety of cases, some of them of public notoriety and known to us all. His construction does not rest on any general reasoning, because, the purpose of avoiding mis-

apprehension, and as if his attention had been directed to the very point, he himself, in the course of his judgment, explains in distinct terms what he meant by the term *partial insanity*. [His Lordship here read the passage above cited in the text, and then continued:] I think, therefore, the learned judge has sufficiently explained what he meant by the occasional use of the term *partial insanity*; and with the explanation he has thus in terms given, and with the whole of his argument, and the illustrations he has used, and the cases to which he has referred in support of that argument, I confess I entirely agree."—5 Russ. Chanc. Cas. 166—167.

(m) 6 Moo. P. C. 341.

himself with the utmost propriety (n). The recent case, however, of *Banks v. Goodfellow* (o) seems to establish that partial unsoundness not affecting the general faculties and operating on the mind of a testator in regard to testamentary disposition will not be sufficient to deprive a person of the power of disposing of his property. But just as partial insanity does not necessarily negative testamentary capacity so a man may be capable of transacting business of a complicated and important kind, involving the exercise of considerable powers of intellect, and yet may be the subject of delusions so as to be unfit to make a Will. The result would seem to be that a person subject to delusions may make a valid Will if the delusions under which he labours be such that they could not reasonably be supposed to have affected the dispositions made by the Will (p).

The following observations of Sir John Nicholl, made in the course of his judgment in *Dew v. Clark*, relating to the proper test of the absence or presence of insanity, are so important and valuable, that it may be expedient to present them in the very words in which they have been reported (pp). "The first point for consideration, and which should be distinctly ascertained, as far as it can be fixed, is, what is the test and criterion of unsound mind, and where eccentricity or caprice ends, and derangement commences. Derangement assumes a thousand different shapes as various as the shades of human character. It shows itself in forms very dissimilar both in character and in degree. It exists in all imaginable varieties, from the frantic maniac chained down to the floor, to the person apparently rational on all subjects and in all transactions save one; and whose disorder, though latently perverting the mind, yet will not be called forth except under particular circumstances, and will

Criterion of insanity.

(n) *Fowles v. Davidson*, 6 Notes of Cas. 473, 474, by Sir H. Jenner Fust; *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

(o) L. R. 5 Q. B. 549, followed

in *Boughton v. Knight*, L. R. 3 P. & D. 64.

(p) *Smee v. Smee*, 5 P. D. 84.

(pp) Dr. Haggard's Report, from the judge's notes, pp. 5-10.

show itself only occasionally in Bedlam, act as other maniacs and themselves essentially maniacs. He fancied himself Duke of Steward to his own estate, that persons under such restriction from respect and towards others themselves. There was nothing in this respect 'medicines' and other a their purpose, have existed undiminished

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show itself only occasionally. We have heard of persons at large in Bedlam, acting as servants in the institution, showing other maniacs and describing their cases, yet being themselves essentially mad. We have heard of the person who fancied himself Duke of Hexham, yet acted as agent and steward to his own committee. It is further observable, that persons under disorder of mind have yet the power of restriction from respect and awe. Both towards their keepers and towards others in different relations they will control themselves. There have been instances of extraordinary cunning in this respect, so much as even to deceive the 'medice' and other attendants, by persons who, on effecting their purpose, have immediately shown that their disorder existed undiminished.

"It has probably happened to most persons who have made a considerable advance in life, to have had personal opportunities of seeing some of these varieties, and these intermediate cases between eccentricity and absolute frenzy, —maniacs who though they could talk rationally, and conduct themselves correctly, and reason rightly, nay, with force and ability, on ordinary subjects, yet on others were in a complete state of delusion,—which delusion no arguments or proofs could remove. In common parlance, it is true, some say a person is mad when he does any strange or absurd act, others do not conceive the term 'madness' to be properly applied unless the person is frantic.

"As far as my own observations and experience can direct me, aided by opinions and statements I have heard expressed in society, guided also by what has occurred in these and in other Courts of justice, or has been laid down by medical and legal writers, the true criterion is—where there is delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence

Absence or presence of delusion the true test of insanity (7).

(7) See *Wheeler v. Alderson*, 5 Fust in Chambers v. The Queen's Bench, 598. Acc. But see also *Proctor*, 2 Curt. 448, 449. observations of Sir H. Jenner

of which neither argument nor proof can convince them, they are of unsound mind: or, as one of the counsel accurately expressed it, 'It is only the belief of facts which no rational person would have believed, that is insane delusion' (r). This delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances—such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion and to establish its insane character.

"Medical writers have laid down the same criterion by which insanity may be known. Dr. Battie, in his celebrated Treatise on Madness (s), thus expresses it. After stating what is not properly madness, though often accompanying it, namely, either too lively or too languid a perception of things, he proceeds:—

"'But qui species alias veris capiet commotus habebitur' and this by all mankind, as well as the physician; no one ever doubting whether the perception of objects not really existing, or not really corresponding to the senses, be a certain sign of madness: therefore "deluded imagination" is not only an indisputable, but an essential character of madness' (t).

"Deluded imagination, then, is insanity.

"Mr. Locke, who practised for a short time as a physician

(r) This passage was cited with approbation by Sir H. Jenner Fust in *Frere v. Peacocke*, 1 Robert. 444. But Lord Brougham remarked, in *Waring v. Waring*, 3 Moo. P. C. 353, that, perhaps, in a strictly logical view, the definition is liable to one exception, or at least, exposed to one criticism, viz., that it gives a consequence for a definition, and that it might be more strictly accurate to term "delusion" the belief of things as realities, which exist only in the imagina-

tion of the patient. "The frame or state of mind," said his Lordship, "which indicates his incapacity to struggle against such erroneous belief constitutes a 'unsound frame of mind.'" See further as to the different kinds of insane delusion, the judgment of Dr. Lushington, in *Prinsep v. Dr. Sombre*, 10 Moo. P. C. 232, 246 S. C., Dea. and Sw. 22.

(s) London, 1758.

(t) S. 1, p. 5.

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though more distinguished as a philosopher, thus expresses himself in his highly esteemed work on the Human Understanding: 'Madmen having joined together some ideas very wrongly, mistake them for truths.—By the violence of their imaginations, having taken their fancies for realities, they make right deductions from them.' Hence it comes to pass, that a man who is of a right understanding in all other things, may, in one particular, be as frantic as any in Bedlam.—'Madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them' (u).

"Here again, the putting wrong ideas together, mistaking them for truths, and mistaking fancies for realities, is Mr. Locke's definition of madness; and he states, that insane persons will reason rightly at times, and yet still are essentially mad: and that they may be mad on one particular subject only" (x).

Although in the case of a person who is sometimes sane, and sometimes insane, if there is no direct proof of his state when he wrote his Will, and there be in it a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's phrenzy, even if there be but one word "sounding to folly" (y); yet the Court of Probate will not at once reject an allegation propounding a Will, which even strongly "sounds to folly" when facts are pleaded, showing that the deceased up to his death conducted himself in the ordinary concerns of life as a sane man (z).

In a case where a woman made a Will, under a power authorising her to dispose of certain property by a Will attested by two witnesses, the Will was pronounced for,

Case of a Will
"sounding to
folly."

A Will may be
pronounced for
though both
the attesting
witnesses

(u) Locke on the Human Understanding, Book 2, c. 11, s. 13.

(z) See the judgment of Sir H. Jenner Fust in *Mudway v. Croft*, 3 Curt. 671, as to the criteria by which to test and ascertain whether natural or innate eccentricity has exceeded the bounds of legal testa-

mentary capacity. See also *Austen v. Graham*, 8 Moo. P. C. 493; *Boughton v. Knight*, L. R. 3 P. & D. 64.

(y) *Swinb.* Pt. 2, s. 3, pl. 15. See *In the goods of Watts*, 1 Curt. 594.

(z) *Arbery v. Ashe*, 1 Harg. 214.

depose to the testator's incapacity, because the Court disbelieved them on other evidence. Effect of commission of lunacy.

though both the witnesses deposed to the deceased's incapacity (a).

The presumption of law is, that a verdict of a jury under a commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded, and if the commission remained unsuperseded, that the party continued a lunatic to his death. Such presumption, however, may be rebutted and displaced by positive proof of entire recovery or possession of a lucid interval when a testamentary instrument was executed (b).

Inofficious testaments.

By the Roman law testaments might be set aside as being *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason) any of the children of the testator: though if the child had any legacy, however small, it was a proof the testator had not lost his memory or his reason, which otherwise the law presumed. But the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosa* to set aside such testament (c). The modern doctrine requires only that there should be satisfactory proof of some kind of the testator's knowledge and approval of the contents of the Will (d).

Persons who from old age or other causes have outlived their understanding.

Besides the two classes of persons *non compotes mentis* already mentioned, viz., idiots and lunatics, Lord Coke mentions two more classes, viz., those who were of good and sound memory, and by the visitation of God have lost it; and those who have become *non compotes* by their own act, as drunkards (e). In the former of these two latter classes must be reckoned those who, from sickness, grief,

(a) *Le Breton v. Fletcher*, 2 Hagg. 558. S. P. in *K. B.*, *Lowe v. Jolliffe*, 1 W. Bl. 365. See *Starnes v. Marten*, 1 Curt. 294; *post*, § 11.

(b) *Prinsep v. Dyce Sombre*, 10

Moo. P. C. 232, 239, 244, 245.

(c) 2 Black. Comm. 503. *Wrench v. Murray*, 3 Curt. 623.

(d) See *post*, Pt. I. Bk. IV. Ch. II. § 5.

(e) 4 Co. 124, b.

accident, or old age, those classed by Lord Coke as being of unsound understanding are defunct. Providence has assigned

But old age alone is not a ground of making a testament. A testament how old soever may be made of the body, but of the mind. Yet if a man in his old age, of unsound understanding, or rather of extreme old age, or of such a state that he knows not his mind, cannot make his testament (h).

"It is not necessary that a man in *Mountain v. Benbow* be absolutely insane, so as to be incapable of lunacy, in order to be incapable of a sound and disposing mind. A man perhaps may be of sound mind at the time of an important act of disposition, and yet be incapable of making a testament."

So it was agreed in *Mountain v. Benbow* that a man may have a sound memory for the time being, and yet be incapable of making a testament.

(f) *Ex parte Cranmer*, 10 Ves. 452, by Lord Erskine. See also *Sanderson*, 19 Ves. 461. See also *Ridgway v. Darwinton*, 10 Ves. 461.

(g) *Swinb.* Pt. 2, s. 8. See also *Woololph*, Pt. 1, c. 8, s. 4. See also *Bird*, 2 Hagg. 142. See also *Lewin*, 1 Ves. Jun. 19. Extreme old age raises some doubt of capacity, but only so far as to excite the suspicion of the Court: *King v. Harrison*, 2 Phillim. 461. In cases where no insanity is proved, either existed or been suspected, the inquiry as to capacity is not raised. W.E.—VOL. I.

accident, or old age, have lost their reason, who are not like those classed by Lord Coke, as "*lunatici*," sometimes having their understanding and sometimes not: but whose understandings are defunct; who have survived the period that Providence has assigned to the stability of their minds (*f*).

But old age alone does not deprive a man of the capacity of making a testament (*g*); for a man may freely make his testament how old soever he be; since it is not the integrity of the body, but of the mind, that is requisite in testaments. Yet if a man in his old age becomes a very child again in his understanding, or rather in the want thereof, or by reason of extreme old age, or other infirmity, he is become so forgetful that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person (*h*).

"It is not necessary," observed Lord Chief Baron Eyre, in *Mountain v. Bennett* (*i*), "to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question, whether he was of a sound and disposing mind, memory and understanding. A man perhaps may not be insane, and yet not equal to the important act of disposing of his property by Will."

Weakness of understanding.

So it was agreed by the judges in *Combe's case* (*k*), that sane memory for the making a Will is not at all times when

(*f*) *Ex parte Cranmer*, 12 Ves. 432, by Lord Erskine. *Sherwood v. Sanderson*, 19 Ves. 283. See also *Ridgway v. Darwin*, 8 Ves. 36.

(*g*) *Swinb. Pt. 2, s. 5, pl. 1. Godolph. Pt. 1, c. 8, s. 4. Bird v. Bird*, 2 Hagg. 142. *Lewis v. Peard*, 1 Ves. Jun. 19. Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the Court: *Kindleside v. Harrison*, 2 Phillim. 461, 462. And in cases where no insanity has either existed or been supposed to exist, the inquiry as to capacity

simply is, whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done. But when lunacy or unsoundness of mind has previously existed, the investigation is of a totally different character: per Dr. Lushington, in *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 278. *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

(*h*) *Swinb. ubi supra. Godolph. ubi supra.*

(*i*) 1 Cox, 356.

(*k*) *Moor*, 759. Vin. Abr. tit. Devise, A. 22. 4 Burn, E. L. 40.

the party can speak "yea or no," or had life in him, nor when he can answer to anything with sense: but he ought to have judgment to discern, and to be of perfect memory. And it is said by Lord Coke, in the *Marquis of Winchester* case (l), that it is not sufficient that the testator be of memory when he makes his Will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such a memory which the law calls sane and perfect memory (m). So it is laid down by Erskine, J., in delivering the opinion of the Judicial Committee of the Privy Council, in *Harwood v. Baker* (n), that in order to constitute a sound disposing mind the testator must not only be able to understand that he is by his Will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from participation in that property (o).

On the other hand it must be observed, that mere weakness of understanding is no objection to a man's disposing of his estate by Will; for Courts cannot measure the size of people's understandings and capacities; nor examine into the wisdom or prudence of men in disposing of their estates (p). "If a man," says Swinburne (q), "be of a mean understanding

(l) 6 Co. 23, a. 4 Burn, E. L. 49.

(m) See further, *Herbert v. Lowins*, 1 Chanc. Rep. 24. *Dyer*, 27, a, in marg. *Ball v. Mannin*, 3 Bligh, N. S. 1. See also the judgment of Sir John Nicholl, in *Marsh v. Tyrrell*, 2 Hagg. 122, as to the rules by which the competency of the mind must be judged; and see further the judgment of the same learned judge in *Ingram v. Wyatt*, 1 Hagg. 401, where some valuable remarks on the subject of

imbecility of mind will be found. For an instance, where weakness of mind and forgetfulness will constitute incapacity, see *Constable v. Tufnell*, 4 Hagg. 465: affirmed on appeal, 3 Knapp, 122.

(n) 3 Moo. P. C. C. 282, 290.

(o) See also *Sefton v. Hopwood*, 1 Fost. & F. 578. *Swinfen v. Swinfen*, 1 Fost. & F. 584.

(p) *Osmond v. Fitzroy*, 3 P. Wms. 120.

(q) Pt. 2, s. 4, pl. 3.

(neither of the will, if it were, betwixt a will and a fool, he might worthily be called a dunce, such a testament" (r).

As to the last of Lord Coke; "He who is a madman (t), at that time, it is void, if he is so excessively weak of reason and understanding is obscured, so that he cannot make his testament, where it appears that he is insane or deranged, and that he has drunk spirituous liquors, and walked and acted in such a manner, that as the testator was not to be considered as of his Will; and the Will is void, and the Court pointed out the case and one of acts, which often be latent, when the testator is in a latent ebriety; and under consideration, the absence of the excitement, and the absence of the act done (y).

(r) See also *Harrod v. Harrod*, 1 P. Wms. 401, 402.

(s) Pt. 2, s. 6.

(t) See *Gore v. Gibson*, 1 P. Wms. 623.

(u) See also *Godolphin v. Godolphin*, 1 P. Wms. 401, 402.

(v) See also *Godolphin v. Godolphin*, 1 P. Wms. 401, 402.

(w) See also *Godolphin v. Godolphin*, 1 P. Wms. 401, 402.

(x) See also *Godolphin v. Godolphin*, 1 P. Wms. 401, 402.

(neither of the wise sort or the foolish), but indifferent as it were, betwixt a wise man and a fool, yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate, or a dunce, such a one is not prohibited from making his testament" (r).

As to the last of the classes of *non compotes* mentioned by Lord Coke; "He that is overcome by drink," says Swinburne (s), "during the time of his drunkenness is compared to a madman (t), and therefore, if he make his testament at that time, it is void in law; which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case" (u). In a case where it appeared that the testator was a person not properly insane or deranged, but habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, it was held that as the testator was not under the excitement of liquor, he was not to be considered as insane at the time of making his Will; and the Will itself was accordingly established (x), and the Court pointed out the difference between the present case and one of actual insanity; inasmuch as insanity may often be latent, whereas there can scarcely be such a thing as latent ebriety; and consequently, in a case like the one under consideration, all which requires to be shown is, the absence of the excitement at the time of the act done; or at least the absence of excitement in any such degree as would vitiate the act done (y).

Persons
drunk:

habitual
drunkenness.

(r) See also Harrod v. Harrod, 1 Bay & J. 4.

(s) Pt. 2, s. 6.

(t) See Gore v. Gibson, 13 M. & W. 693.

(u) See also Godolph. Pt. 1, c. 8, s. 3.

(z) Ayrey v. Hill, 2 Add. 206.

See also Billingham v. Vickers, 1 Phillim. 191. Handley v. Stacey, 1 Fost. & F. 574.

(y) 2 Add. 210. See also Wheeler v. Alderson, 3 Hagg. 602, 608. In the case of Rex v. Wright, 2 Burr

prisoners, captives, and the like (d). But the law of England does not make such persons absolutely intestable, but only leaves it to the discretion of the Court to judge upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi* (e).

If it can be demonstrated that actual force was used to compel the testator to make the Will, there can be no doubt, although all formalities have been complied with, and the party perfectly in his senses, yet such a Will can never stand (f).

Will obtained
by force :

So, if there were, at the time of bequeathing, a fear upon the testator, it could not be, as it ought, *libera voluntas* (g). It must be understood, that "it is not every fear, or a fear that will have the effect of annulling the Will; but a just fear, that is, such as that indeed without it the testator had not made his testament at all, at least not in that manner (h). A vain fear is not enough to make a testament void; but it must be such a fear as the law intends when it expresses it by a fear that may *cadere in instantem virum* (i) : as the fear of death, or of bodily hurt, of imprisonment, or of loss of all or most part of one's goods, or the like (k) : whereof no certain rule can be determined, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity and the like" (l).

by fear :

Fraud is no less detestable in law than open force. Where-

by fraud :

(d) Swinb. Pt. 2, s. 8. Godolph. Pt. 1, c. 9.

(h) Godolph. Pt. 3, c. 25, s. 8.

(e) 2 Black. Comm. 497.

(i) Godolph. Pt. 3, c. 25, s. 8.

(f) Mountain v. Bennett, 1 Cox, 4, by Eyre, C.B.

Swinb. Pt. 7, s. 2, pl. 7.

(k) Swinb. Pt. 7, s. 2, pl. 7.

(g) Godolph. Pt. 3, c. 25, s. 8.

(l) Swinb. Pt. 7, s. 2, pl. 7. See

Swinb. Pt. 7, s. 2, pl. 1.

Nelson v. Oldfield, 2 Vern. 76.

fore, when the testator is circumvented by fraud, the testament is of no more force than if he were constrained by fear (*m*). With regard to what deceit shall annul a testament on the ground of fraud, as in the case of a Will made under fear, it is left to the discretion of the judge, comparing the deceit to the capacity or understanding of the person deceived to discern whether it be such as may overthrow the testament or not (*n*). If a part of a Will has been obtained by fraud, probate, it should seem, ought to be refused as to that part, and granted as to the rest (*o*).

It was settled by the case of *Allen v. McPherson* (*p*) that a Will, whether of personal or real property, could not be set aside *in equity* on the ground that the Will was obtained by fraud and imposition; because a Will of personal estate might be annulled for fraud in the Court of Probate, and a Will of real estate might be set aside at law; for in such cases, as the *animus testandi* is wanting, it cannot be considered as a Will (*q*).

by importunity:

If a man (said Rolle, C.J., at a trial at bar) makes a Will in his sickness, by the over-importunity of his Wife, to the

(*m*) Swinb. Pt. 7, s. 3, pl. 1. Fraud and imposition upon weakness is a sufficient ground to set aside a Will of real, much more of personal estate, though such weakness is not sufficient to ground a commission of lunacy: By Lord Hardwicke, in Lord Donegal's case, 2 Ves. Sen. 408.

(*n*) Swinb. Pt. 7, s. 3, pl. 3. See also the cases cited by Lord Lyndhurst, in *Allen v. McPherson*, 1 H. of L. 207, 208, of Wills obtained by false representations.

(*o*) *Allen v. McPherson*, 1 H. of L. 191. *Trimbletown v. D'Alton*, 1 Dow, N. S., stated *post*, p. 41.

(*p*) 1 H. L. 191. In some earlier cases we find the Court of Chancery distinctly asserting its

jurisdiction to relieve against fraud in obtaining Wills, as in *Maundy v. Maundy*, 1 Ch. Rep. 123; in other cases, disclaiming such jurisdiction, though the fraud was gross and palpable, as in *Roberts v. Wynn*, 1 Ch. Rep. 236; and in other cases, steering a middle course, by declaring the party who practised the fraud a trustee for the party prejudiced by it: *Robert v. Lowins*, 1 Chanc. Rep. 22.

(*q*) As to how far the jurisdiction of the Probate Division is exclusive in respect of the grant or revocation of probate, see *post* Pt. I. Bk. IV. Ch. I. § 1. The Chancery Division has, since the Judicature Act, complete jurisdiction to establish or set aside a Will of real property.

and he may be quiet by constraint, and a Importunity, in such a degree as to must be such import will render the a the free act of a cap instrument (*s*).

A Will made by when a Will is so m against importunity in requiring proof be in an ordinary ca

With respect to a lawful for a man, b procure a Will in Neither is it to inc speeches (*x*): for t influence the dispos influence in the leg partiality has been where persuasion i when even a word d inspiring fear (*y*).

(*r*) *Hacker v. Newb* 427. See also *Mone Brown*, 8 Vin. Abr. 167 (22), pl. 7. *Lamkin* Cas. temp. Lee, 1.

(*s*) By Sir John 1 *Kindleside v. Harrison* 331, 352.

(*t*) *Green v. Skipwor* lim. 58.

(*u*) Swinb. Pt. 2, s. 4 is no part of the testam of this country, that th Will must originate with nor is it required that p

and he may be quiet, this shall be said to be a Will made by constraint, and shall not be a good Will (r).

Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased; not the free act of a capable testator; in order to invalidate the instrument (s).

A Will made by interrogatories is valid: but undoubtedly when a Will is so made, the Court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case (t).

With respect to a Will obtained by influence, it is not unlawful for a man, by honest intercession and persuasion, to procure a Will in favour of himself or another person (u): Neither is it to induce the testator, by fair and flattering speeches (x): for though persuasion may be employed to influence the dispositions in a Will, this does not amount to influence in the legal sense; and whether or not a capricious partiality has been shown, the Court will not inquire. But where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear (y).

(r) *Hacker v. Newborn, Styles*, 427. See also *Money Penny v. Brown*, 8 Vin. Abr. 167, tit. Devise (Z 2), pl. 7. *Lamkin v. Babb*, 1 Cas. temp. Lee, 1.

(t) By Sir John Nicholl, in *Kindleside v. Harrison*, 2 Phillim. 551, 552.

(s) *Green v. Skipworth*, 1 Phillim. 58.

(u) *Swinb. Pt. 2, s. 4, pl. 1*. It is no part of the testamentary law of this country, that the making a Will must originate with a testator; nor is it required that proof should

be given at the commencement of such a transaction, provided it be proved that the deceased completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition: By Sir J. Nicholl, in *Constable v. Tufnell*, 4 Hagg. 477; affirmed on appeal, 3 Knapp, 122.

(x) *Swinb. Pt. 7, s. 4, pl. 1*.

(y) By Sir Wm. Wynne, in *Dickinson v. Moss*, Prerog. T. 1790. MS. 4 Burn, 58, Tyrwhitt's Edit.

The sort of influence which will invalidate a Will is thus described by Eyre, C.B., in *Mountain v. Bennett* (z): "There is another ground, which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the Will; that is, if a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind."

But the influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear (a).

In two important cases, in the Prerogative Court, Wills made by persons of sufficient capacity, but of weak minds, have been set aside on the ground of improper influence. The Will, in one of these cases, was made in favour of the attorney and agent of the testator (b), in the other, by a wife

(z) 1 Cox, 355.

(a) *Williams v. Goude*, 1 Hagg. 581. *Constable v. Tufnell*, 4 Hagg. 485. *Sefton v. Hopwood*, 1 Fost. & F. 578. *Lovett v. Lovett*, *Ibid.* 581. *Hall v. Hall*, L. R. 1 P. & D. 481. As to undue influence, dependent on religious feelings, see *Norton v. Rely*, 2 Eden. 286. *Huguenin v. Baseley*, 14 Ves. 273. *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

(b) *Ingram v. Wyatt*, 1 Hagg.

94. The judgment of Sir J. Nicholl in this celebrated case was reversed by the Delegates; 3 Hagg. 466: not, however, on any point of law, but on a view of the evidence of the cause. The correctness of Sir J. Nicholl's judgment, so far as regards his exposition of the law on the subject of improper influence, was recognised by the Judicial Committee of the Privy Council in the case of *Cockraff v. Rawles*, 4 Notes of Cas. 237.

in favour of her husband, in the House of Lords (d), it was held, that where the mind of the testator is influenced, in favour of the Will, in favour of the testator; but the Will is not void; but the Will is void; so that a Will is void as to others; in another (e).

The subject of undue influence. In a case in the House of Lords, *Drummond v. Drummond*, made the subject of the judgment, we often speak of undue influence, when the influence of another, when the influence of another, which would invalidate the Will, into dissipation by folly, or into dissipation by folly, for years, to whom the influence of another, consider habits of dissipation, creditable; the compulsion of another, undue influence.

In a case, influenced by his attorney, he made him astray, where the influence of another, everything he possesses, impeached on the ground, the influence of another, be altered merely, even importuned, the influence of another.

(c) *Marsh v. Tyrrel*, 2 Hagg. 466. In this case there was an influence of another, the Delegates; but the influence of another, afterwards compromised; 71.

(d) *Trimlestown v. Dr. Drummond* (New Series), 85.

(e) See further, on the subject of undue influence, *Mynn v. Robinson*, 1 Hagg. 179; in which Sir J. Nicholl held that the Will of a married woman was void while she was in the influence of another.

in favour of her husband (c). And in another case in the House of Lords (d), on an appeal from the Irish Chancery, it was held, that where undue influence is exercised over the mind of the testator in making his Will, the provisions in the Will, in favour of the person exercising that influence, are void; but the Will may be good, as far as respects other parties; so that a Will may be valid as to some parts, and invalid as to others; may be good as to one party, and bad as to another (e).

The subject of undue influence received full consideration in a case in the House of Lords (f), on which occasion Lord Cranworth made the following observations: "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a Will. A young man is often led into dissipation by following the example of a companion of his younger years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who has thus led him astray, were to make a Will and leave to him everything he possessed, such a Will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property:

(c) *Marsh v. Tyrrel*, 2 Hagg. 84. In this case there was an appeal to the Delegates; but the case was afterwards compromised; 3 Hagg. 71.

(d) *Trimbletown v. D'Alton*, 1 New (New Series), 85.

(e) See further, on the subject of influence, *Mynn v. Robinson*, 2 Hagg. 179; in which case Sir John Nicholl held that when the Will of a married woman, obtained while she was in an ex-

tremely weak state, nine days before death, by the active agency of the husband, the sole executor and universal legatee, wholly departed from a former Will, deliberately made a few months before, the presumption was strong against the act; and the evidence not being satisfactory, the Will was pronounced against, and the husband condemned in the costs.

(f) *Boyse v. Rossborough*, 6 H. of L. 6.

Provided only, that in making such a Will, the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish."

"In order therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a Will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a Will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his Will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a Will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any Will executed under false impressions thus kept alive (g). It is, however, extremely

(g) See *Acc. Allen v. McPherson*, 1 H. of L. 207, per Lord Lynd

difficult to state in undue influence in order to say, that, allowing range themselves under or fraud."

After observing, that has been duly executed standing and apparent that it was executed who alleges it, his aside the Will of a to show that the consistent with the undue influence: It with a contrary hypothesis an influence exercised influence in relation the principle must be that, at and near the preached was executed important transaction benefited by the Will but was acting under be such as fairly to sense of evidence by Will, that in regard exercised." To be there must be coercion person who becomes which he or she does influence (gg).

In the case of g

hurst. White v. White Tr. 505; in which last *Creaswell* held that a fraud kind could not be set u

difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."

After observing, that where it has been proved that a Will has been duly executed by a person of competent understanding and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it, his Lordship thus proceeded: "In order to set aside the Will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence: It must be shown that they are inconsistent with a contrary hypothesis. The undue influence must be an influence exercised in relation to the Will itself, not an influence in relation to other matters or transactions. But the principle must not be carried too far. Where a jury sees that, at and near the time when the Will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the Will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the Will, that in regard to that also the same undue influence was exercised." To be undue influence in the eye of the law there must be coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence (*gg*).

In the case of gifts or other transactions *inter vivos*, it

White v. White, 2 Sw. & Tr. 595; in which last case Sir C. Cresswell held that a fraud of this kind could not be set up under a

plea of undue influence.

(*gg*) *Wingrove v. Wingrove*, 11 P. D. 81.

is considered by Courts of Equity that the natural influence which relations such as those of solicitor and client, guardian and ward, physician and patient, tutor and pupil, involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment (*h*). The law regarding Wills is very different from this, and the mere proof of the existence of such a relation is no evidence of undue influence, and the party relying thereon must give some evidence of coercion or dominion exercised over the testator against his will or of coercion so strong that it could not be resisted (*i*).

Wills of seamen :

Persons in the sea service are frequently under the pressure of urgent wants, and to procure an immediate supply of those wants (such as an outfit, or the like) they will, without thought, comply with almost any condition proposed to them. These temporary necessities have been considered to operate on them as a sort of duress, on the part of those who are to furnish the supply: and it is partly on this consideration, that the policy of the law has been extended to guard the testamentary acts of this class of persons (*j*).

made on the same instrument with a warrant of attorney invalid.

By statute 9 & 10 Wm. III. c. 41, s. 6 (now repealed, but re-enacted) (*k*), it is provided, "that no Will of any seaman

(*h*) *Archer v. Hudson*, 7 Beav. 557.

(*i*) *Parfitt v. Lawless*, L. R. 2 P. & D. 462; see also *Ashwell v. Lomi*, reported in the note thereto.

(*j*) *Zacharias v. Collis*, 3 Phillim. 177.

(*k*) The stat. 9 & 10 W. 3, c. 41, s. 6, was repealed and re-enacted by the stat. 55 G. 3, c. 60, s. 4. The latter statute was itself repealed by the Stat. 11 G. 4 and

1 W. 4, c. 20, which last Act provides that no Will of any petty officer, seaman, non-commissioned officer of marines, or marine, shall be deemed good or valid in law, to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment, with a power of attorney. A similar enactment is contained in stat. 28 & 29 Vict. c. 72, s. 4, which supersedes 11 G. 4 and 1 W. 4, c. 20, now repealed.

contained, printed or parchment, with good or available. Soon after the p. *Lester* was decided *Hedges* held, and gates, that the W. *ferent instrument* decision, although the Act, must, it s. of the words of it.

The case of *Cro* ous others in the Wills made by m. But neither the st. stood as making the circumstance of the absolute defeasance be valid. The pro. relation of agent proof, not only of instrument, but al. effect: that wherev. debt, it shall not op. whole property; b. be a debt, yet if the intended to dispose shall be valid (*m*).

The equity of the the Wills of marine persons given to see

(*l*) *Delegates*, 11th J. cited by Sir John M. *Zacharias v. Collis*, 189.

(*m*) *Zacharias v. Col*

contained, printed or written *in the same instrument, paper, or parchment, with a warrant or letter of attorney, shall be good or available in law to any intent or purpose whatsoever.*"

Soon after the passing of this statute, the case of *Craig v. Lester* was decided upon its construction. There Sir Charles Hedges held, and his sentence was confirmed by the Delegates, that the Will was invalid, though executed *on a different instrument* from the power of attorney (l). This decision, although it may not have gone beyond the spirit of the Act, must, it should seem, be considered as a bold stretch of the words of it.

The case of *Craig v. Lester* has been followed by numerous others in the Prerogative Court, fully establishing, that Wills made by mariners as securities for debts are void. But neither the statute nor these decisions must be understood as making the relation of agent and seaman, or the circumstance of the seaman being indebted to his agent, an absolute defeasance to the Will, so that it could, in no case, be valid. The proper result to be deduced is, that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that wherever it is executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by Will, the instrument shall be valid (m).

The equity of these statutes cannot be extended beyond the Wills of mariners, so as to invalidate the Wills of other persons given to secure debts (n).

Wills of seamen made as security for debt, invalid:

Seems, as to Wills of other persons.

(l) Delegates, 11th June, 1714, cited by Sir John Nicholl, in *Zacharias v. Collis*, 3 Phillim. 180.

lim. 202, 203, 204. See also *Deardsley v. Fleming*, 2 Cas. temp. Lee, 98.

(n) *Florance v. Florance*, 2 Cas. temp. Lee, 87.

(m) *Zacharias v. Collis*, 3 Phil-

Before passing of Married Women's Property Act
feme covert generally incapable of making a Will :

Before the passing of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, the capacity of a married woman to dispose of her real and personal estate by Will was limited. This statute does not apply to any Will made before 1 Jan., 1883. It is therefore necessary to consider the law as applicable to Wills on which the statute cannot operate. A married woman was not only utterly incapable of devising *lands* (*o*) (being excepted out of the Statute of Wills, 34 & 35 Hen. VIII. c. 5) (*p*), but also she was incapable of making a testament of *chattels*, without the license of her husband; and such a Will, being considered a mere nullity, was not admitted to probate in the Court of Probate (*q*): For all her personal chattels were absolutely his; and he might dispose of her chattels real, or have them to himself, if he survived her: It would therefore have been extremely inconsistent to have given her a power of defeating that provision of the law, by bequeathing those chattels to another (*r*). The stat. 1 Vict. c. 26, made no alteration in the law with respect to the testamentary capacity of a feme covert; for by sect. 8, it was provided and enacted, that "no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act." But this section does not exclude the Wills of married women from the operation of the 24th section (*s*), as to a Will speaking, as to the real and personal estate comprised in it, as if executed immediately

(*o*) This incapacity to devise real estate does not arise from the husband's interest in her property, and consequently cannot be cured by his renunciation of interest: *Dye v. Dye*, 13 Q. B. D. 147.

(*p*) Impliedly repealed by M. W. P. A. 1882, in so far as it disabled married women from devising lands.

(*q*) *Steadman v. Powell*, 1 Add. 58. *Bransby v. Haines*, 1 Cas. temp. Lee, 120. *Tucker v. Inman*, 4 M. & Gr. 1076.

(*r*) *Andrew Ognel's case*, 4 Ch. 51 b. 2 Black. Comm. 498.

(*s*) *Noble v. Phelps*, L. R. 2 P. & D. 278. See *post*, Pt. I. Bk. II. Ch. IV. § II. Pt. III. Bk. III. Ch. IV. § VIII.

before the testator's general gift being

Since the husband's personal estate which and as the law permitted it enabled her, even the Act, 1882, in execution a woman could not do instance, without however, to those executrix (*x*). The pass, by a pure right owner, such of his and no beneficial interest part of them: and have been received by and not disposed of property, and were

But as the husband the law bestowed on a Will to dispose of might assent to his the wife's executor

(*t*) *Thomas v. Jones*, & Sm. 63. But the 24th not speak from the married women so as to give effect to her during coverture as to acquired after the death husband: *Willock v. N*, 7 H. L. 580, affirming S. Ch. 778, and this case was Pearson J., to be untouch Married Women's Property Act, 1882, sect. 1 (sub-a. 1) ground that such a sub-section only to a disposition by woman during coverture

before the testator's death (t),—or of the 27th section, as to a general gift being an execution of a power (u).

Since the husband had no beneficial interest in the personal estate which the wife took in the character of executrix, and as the law permitted her to take upon herself that office, it enabled her, even before the Married Women's Property Act, 1882, in exception to the general rule that a married woman could not dispose of property, to make a Will in this instance, without the consent of her husband; restricted, however, to those articles to which she was entitled as executrix (x). The effect of such an instrument is merely to pass, by a pure right of representation, to the testator or prior owner, such of his personal assets as remained outstanding, and no beneficial interest which the wife might have in any part of them: and with respect to the assets which might have been received by the feme executrix during the marriage, and not disposed of, they immediately became the husband's property, and were not affected by the Will (y).

But as the husband could always waive the interest which the law bestowed on him, he might empower the wife to make a Will to dispose of her personal estate. Thus a husband might assent to his wife's Will, and such assent entitled the wife's executor to claim such articles of her personal

except of property to which she was entitled in *autre droit*, as executrix.

Husband may assent to his wife's Will:

(t) *Thomas v. Jones*, 1 De G. J. & Sm. 63. But the 24th sect. does not speak from the death of a married woman so as retroactively to give effect to her Will made during coverture as to property acquired after the death of her husband: *Willock v. Noble*, L. R. 7 H. L. 580, affirming S. C. L. R. 8 Ch. 778, and this case was held by Pearson J., to be untouched by the Married Women's Property Act, 1882, sect. 1 (sub-a. 1), on the ground that such sub-section applies only to a disposition by a married woman during coverture of pro-

perty which she *then* has; and that consequently, notwithstanding sect. 24 of the Wills Act, her Will made during coverture is not, unless it is re-executed after she has become discoverd, effectual to dispose of property which she acquires after the coverture has come to an end: *Re Price*, 28 C. D. 709.

(u) *Thomas v. Jones*, 1 De G. J. & S. 63; *Noble v. Phelps*, L. R. 2 P. & D. 276.

(x) *Scammell v. Wilkinson*, 2 East, 552.

(y) *Hodsdon v. Lloyd*, 2 Bro. C. C. 534, 543.

estate, which would have been her husband's as her administrator (z).

he must assent
to the particu-
lar Will :

But in order thus to establish the Will, a general assent that the wife might make a Will was not sufficient ; it should be shown that he had consented to the particular Will that she had made (a), and his consent should have been given when it was proved (b). He might, therefore, revoke his consent at any time during his wife's life, or after her death before probate (c). But this consent might be implied from circumstances ; and if *after* her death he acted upon the Will, or once agreed to it, he was not, it seems, at liberty to retract his assent, and oppose the probate (d). And when the Will was made in pursuance of an express agreement or consent, it was said that a little proof would be sufficient to make out the continuance of the consent after her death (e).

what was suffi-
cient assent :

This assent on the part of the husband was no more than a waiver of his rights as his wife's administrator (f). It therefore could only give validity to the instrument, in the

husband's
assent only
available if he
survived.

(z) *Tucker v. Inman*, 4 M. & Gr. 1076. As to what such articles are, see *post*, Pt. II. Bk. III. Ch. I. § III.

(a) *Rex v. Bettesworth*, 2 Stra. 891. *Willock v. Noble*, L. R. 7 H. L. 580.

(b) *Henley v. Philips*, 2 Atk. 47.

(c) *Swinb.* Pt. 2, s. 9, pl. 10. 4 Burn, Ecc. L. 52. *Brook v. Turner*, 2 Mod. 170.

(d) *Brook v. Turner*, *ubi supra*. Accordingly in *Maas v. Sheffield*, *Prerog. M. T.*, 1845, 4 Notes of Cas. 350, S. C., 1 Robert. 364, it was held by Sir H. Jenner Fust, that if, after the death of the wife, the husband does assent to a particular Will, he is bound by that assent. Where a wife made a Will, disposing of a fund over which she had a power, and also of a fund

over which she had no power, and made her husband her executor, and he proved her Will generally, Sir L. Shadwell, V.-C., held that, as to the latter fund, the Will was valid, as being made *ex assensu viri* : *Ex parte Fane*, 16 Sim. 406. And in the case of a Will made by a married woman who appointed her husband an executor and he assented to the making of the Will, and after her death expressed his intention to take probate, but died before so doing without withdrawing his consent, it was held that he had assented to the Will : In the goods of *Cooper*, 6 P. D. 34.

(e) *Brook v. Turner*, 2 Mod. 173.

(f) In the goods of *Smith*, *Sw. & Tr.* 127, per Sir C. Cresswell.

event of his being the executor, died before his wife, his next of kin, so far as it derived from her, therefore, did not pass to her during the coverture.

If the circumstance was that the testator died in 1838 (and consequently before the operation of the statute), and if her husband might be presumed to recognize her Will as made by such an instrument by such a person, so, a woman by recording her Will, republish, during her life, when a feme sole, and as to her personality, as if made by her.

of the stat. 1 Vict. after the 1st January, 1838, the Will itself were made.

Hitherto the subject

of cases of Wills, which require the consent to waive his rights, occurred that the Will was made in pursuance of an agreement made after marriage, and married women made Wills, the same rules as those which apply to power (l) ; concerning which refer the reader to the notes of the case of *Man* to enlarge this view.

(g) *Stevens v. Bagwell*, 10 B. & C. 368. *Price v. Parker*, 1 B. & C. 368. *Noble v. Phelps*, 1 B. & C. 276—283. *Willock v. Noble*, L. R. 7 H. L. 580. As to the assent of the husband, see *Cooper on Husband and Wife*, p. 170—189.

(h) *Miller v. Frown*, 2 B. & C. 170.

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event of his being the survivor. Hence it follows, that if he died before his wife, her Will was void against her next of kin, so far as it derived its effect from his consent; and it, therefore, did not pass the right of property bequeathed to her during the coverture (*g*).

If the circumstances took place before the 1st of January, 1838 (and consequently the case did not fall within the operation of the stat. 1 Vict. c. 26), a widow after the death of her husband might, without any formal republication, recognize her Will made during her coverture; and the instrument by such a recognition, operated as a new Will (*h*). So, a woman by recognition, without any formalities, might republish, during her widowhood, a Will that she had made when a feme sole, and such Will was then equally valid, as to personality, as if made in her widowhood (*i*). But by reason of the stat. 1 Vict. c. 26, no such recognition made on or after the 1st January, 1838, can be effectual, notwithstanding the Will itself were made before that date (*k*).

Hitherto the subject has only been considered with respect to cases of Wills, which were merely valid by the husband's consent to waive his rights as administrator. But it often occurred that the Will of a married woman was made in pursuance of an agreement before marriage, or of an agreement made after marriage, for consideration. Wills of married women made under such circumstances, fall under the same rules as those made by a *feme covert*, by virtue of a power (*l*); concerning which it is thought more advisable to refer the reader to the several able Treatises on that subject, than to enlarge this work by a farther discussion of it (*m*).

A widow might, prior to 1838, by recognition set up her Will made during coverture, or one made when a *feme sole*.

Will of *feme covert* made in pursuance of agreement before marriage, or by virtue of a power:

(*g*) *Stevens v. Bagwell*, 15 Ves. 209.

(*h*) *Price v. Parker*, 16 Sim. 209.

(*i*) *Noble v. Phelps*, L. R. 2 P. D. 276—283.

(*j*) *Willock v. Noble*, L. R. 7 H. L. 580.

As to the consent of the husband, see generally

Cooper on Husband and Wife, 2 ed.

p. 170—189.

(*k*) *Miller v. Crown*, 2 Hagg.

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(*l*) *Long v. Aldred*, 3 Add. 48.

(*k*) See *post*, Pt. I. Bk. II. Ch. iv.

(*l*) *Tucker v. Inman*, 4 M. & G. 1077.

(*m*) *Sugden on Powers*, chap. 3.

As to the husband's right to administration, *cæterorum*, see *post*,

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not available
without probate :

probate may
be obtained
of such a Will
without hus-
band's con-
sent :

It must still be remarked, that although a different rule formerly prevailed, a testamentary appointment of such a nature by a wife cannot now be made available, either at law or equity, without probate (*n*), but a Will of a married woman made during coverture under a power and disposing of real property only, is not entitled to probate though there is an appointment of executors (*o*). Where, however, a married woman having a power of appointment over real property executed the power in favour of herself, and afterwards made a Will directing that a portion of the property should be sold to pay legacies and erect a memorial window, it was held that as she possessed the property as separate estate, and had appointed an executor and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the Will was entitled to probate (*p*). And the Court of Probate would allow such appointment to be proved without the husband's consent (the probate being limited to the property comprised in the power (*q*)) although its former practice was to require the husband's concurrence before it would admit the instrument to probate. Formerly the Court of Probate did not take upon itself to enter with any great minuteness into the construction of the powers, under which Wills of this kind were executed, or as to the due compliance with their conditions. But according to the more modern practice, until the decision of the case of *Barnes v. Vincent* (hereafter mentioned), the Court of Probate considered itself bound to decide in the first instance, not only whether there was a power authorizing the testamentary act, but also whether the power had been duly executed, before it gave the instrument the sanction of its seal (*r*). Yet if the Court felt any real

Pt. I. Bk. iv. Ch. II. § VII. ; Bk. v. Ch. II. § I.

(*n*) *Ross v. Ewer*, 3 Atk. 160. *Stone v. Forsyth*, Dougl. 708. *Sugden on Powers*, 332, 4th edit. *Tucker v. Inman*, 4 M. & Gr. 1049.

(*o*) In the goods of *Tomlinson*, 6 P. D. 200.

(*p*) *Brownrigg v. Pike*, 7 P. D. 61. And see In the goods of *Hornbuckle*, 15 P. D. 149.

(*q*) See *post*, Pt. I. Bk. iv. Ch. III. § VII.

(*r*) *Allen v. Bradshaw*, 1 Cr. 110, 121.

doubt on the point, admit the paper to such a probate will of Equity to act upon circumstances which effect as a valid &c., the Temporal judgment of the S. hand, if the Court decision would be first proceed to the consi paper, till it has been at last, in the case of the Judicial Comm the decision of the P proper course for the wheresoever the pap under a power, and i testamentary intention and save those connected on the provisions of which has to deal with decide whether or not its execution. Their of opinion, that, on a Court should grant p as to the existence of

(*o*) *Rich v. Cockell*, 9 *Price v. Parker*, 16 Sim. 16. over, if the instrument admitted to probate, a Equity is precluded from ing it as a Will; and office of that Court is to s as been duly executed ested according to the *Douglas v. Cooper*, 3 M. & *Whicker v. Hume*, 7 H. of

doubt on the point, it was always deemed the safer course to admit the paper to probate: inasmuch as the production of such a probate will not alone be sufficient to induce a Court of Equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, viz., attestation, sealing, &c., the Temporal Courts were never contented with the judgment of the Spiritual Court(s): whilst on the other hand, if the Court of Probate should reject the paper, its decision would be final; as the Court of Construction will not proceed to the consideration of the effect of any testamentary paper, till it has been proved in the Probate Court (t). But at last, in the case of *Barnes v. Vincent* (u), it was held by the Judicial Committee of the Privy Council (reversing the decision of the Prerogative Court of Canterbury) that the proper course for the Ecclesiastical Court is to grant probate wheresoever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power (for example, no objection on the provisions of the Wills Act), and to leave the Court which has to deal with the rights under that instrument, to decide whether or not it is authorized by that power and by its execution. Their Lordships appear further to have been of opinion, that, on a power being alleged, the Ecclesiastical Court should grant probate, without going into any question as to the existence of the power. The decision in this case

without any decision as to whether it is authorized by the power and its execution.

(t) *Rich v. Cockell*, 9 Ves. 376. *Price v. Parker*, 16 Sim. 198. However, if the instrument has been admitted to probate, a Court of Equity is precluded from questioning it as a *Will*; and the only office of that Court is to see that it has been duly executed and attested according to the power: *Douglas v. Cooper*, 3 M. & K. 378. *Whicker v. Hume*, 7 H. of L. 121,

144. But see *Morgan v. Annis*, 3 De G. & Sm. 461.

(u) *Allen v. Bradshaw*, 1 Curt. 121, 122. In the goods of Biggar, 2 Curt. 336. See *post*, Pt. I. Bk. IV. Ch. III. § IX. But see also *Goldworthy v. Crossley*, 4 Hare, 140, 145.

(u) 4 Notes of Cas. Suppl. xxi. S. C., 5 Moo. P. C. 201.

was declared by their Lordships to be a restoration of "the ancient and laudable practice" of the Ecclesiastical Court (x). The question as to the jurisdiction of the Probate Division and the limit in practice of its exercise (which is wholly different from the question of the jurisdiction and practice of the Ecclesiastical Courts and the Probate Court), has been recently before the Courts in the case of *In the goods of Tharp* (y) in which *Barnes v. Vincent* was commented on in the Court of Appeal, and it was pointed out that such case was decided at a time when the then Court of Probate, being an Ecclesiastical Court, was a Court of very limited jurisdiction, and could not decide the question of the sufficiency of the execution of the power and also that since the passing of the Judicature Act everyone of the Divisions of the High Court of Justice, and every judge, has now jurisdiction to do that which might be done by any other Division or any other judge. Thus in the present day it would seem that, in a case of a Will of a married woman made under a power, it would not only be competent to, but also incumbent upon, the Probate Division, if the Court had all persons interested before it, to decide the question not only whether there was a power, but whether it was well executed.

In cases where a Will is made by a married woman under a power, her executors do not take *jure representationis*, but merely under the power which she was authorised to exercise by making a Will as to particular property. And, consequently, the title of her executors did not extend beyond the property the subject of the power (z).

(x) Where the Will of a married woman recited a power to bequeath certain property in case of her dying without issue, the Court refused to grant administration with the Will annexed to one of her children, but granted a general administration founded on an affidavit that the testatrix left no Will

operative at law. In the goods of Graham, L. R. 2 P. & D. 388. *Noble v. Phelps*, L. R. 2 P. & D. 276.

(y) 3 P. D. 76.

(z) *Tugman v. Hopkins*, 4 M. & Gr. 389. *O'Dwyer v. Gore*, 1 S. & Tr. 465. And, consequently there would have been an inter-

Executors of the Will of a married woman made under a power take nothing *jure representationis*.

According to the married woman's administration with the Will purported specified in the grant.

It need hardly be woman, made under undue influence and wishes and intention (b). So if a wife's Will, makes her compulsion of her satisfactory proof of its contents and execution.

Besides the case of virtue of a power, then Property Act, other her was valid without personal property was to be given or settled such a case it has been *place v. Gorges* (d), sole, to the full extent form to do so is presentment or agreement which that decision was

as to property not by the power.

(a) Rule 15, 1862, P. (Contentious Business). was repealed in April, by the rule (18) substituted is enacted that in the Probate of the Will of a woman it shall not be recite in the grant, to lead the separate personal estate of the testatrix or the power or

According to the old practice, in granting probate of a married woman's Will made by virtue of a power, or administration with such Will annexed, the power under which the Will purported to have been made must have been specified in the grant (a).

Grant of probate under old practice to specify the power.

It need hardly be observed, that if a Will of a married woman, made under a power, be obtained by the husband by undue influence and marital authority, contrary to her real wishes and intentions, such Will will not be admitted to probate (b). So if a wife have power to dispose of property by her Will, makes her Will, and afterwards destroys it by the compulsion of her husband, it may be established, upon satisfactory proof of its having been so destroyed, and also of its contents and execution (c).

Will unduly obtained or unduly destroyed by marital authority.

Besides the case of a Will, made by a married woman by virtue of a power, there were, even before the Married Women's Property Act, other circumstances under which a will made by her was valid without the assent of her husband, *viz.*, where personal property was actually given or settled, or was agreed to be given or settled, to the separate use of the wife. In such a case it has been established, since the case of *Fettiplace v. Gorges* (d), that she may dispose of it as a *feme sole*, to the full extent of her interest, although no particular form to do so is prescribed in the instrument by which the settlement or agreement was made. The principle upon which that decision was founded is this; that when once the

Will of *feme covert* of personalty settled, or agreed to be settled, to her separate use:

property as to property not disposed of by the power.

(a) Rule 15, 1862, P. R. (Non-contentious Business). This rule was repealed in April, 1887, and by the rule (18) substituted for it it is enacted that in the grant of probate of the Will of a married woman it shall not be necessary to recite in the grant, or in the oath to lead the same, the separate personal estate of the testatrix or the power or authority

under which the Will has been, or purports to have been, made. The probate shall take the form of ordinary grants of probate without any exception or limitation and issue to the executor.

(b) *Marsh v. Tyrrell*, 2 Hagg. 84. *Mynn v. Robinson*, 2 Hagg. 179.

(c) *Williams v. Baker*, Prerog. Trin. Term. 1839.

(d) 1 Ves. Jun. 46. S. C., 3 Bro. C. C. 8.

good, of property in reversion as well as possession :

extends to accretions.

Statutory testamentary powers of

wife is permitted to take personal property to her separate use as a *feme sole*, she must so take to it with all its privileges and incidents, one of which is the *jus disponendi* (e). And it may be stated as a general rule, that personal property which has been acquired by a married woman under such circumstances, that it became her separate estate, may be dealt with by her as if she were a *feme sole* (f). And this rule prevailed without regard to the circumstance, whether the property were in possession or reversion (g), and whether it were vested or contingent (h). And when she has such a power over the principal, it extends also to its produce and accretions, e.g., the savings of her pin-money (i). Nor did it make any difference whether the property were given to trustees for the wife's separate use, or without the intervention of trustees, to the wife herself, for her own separate use and benefit (k); for in the latter case a Court of Equity would decree the husband to stand as a trustee to the separate use of the wife (kk).

Even before the Married Women's Property Act, 1882, the Legislature had by statute given married women testa-

(e) *Rich v. Cockell*, 9 Ves. 369. But in the case of such property the title to which accrued to a married woman before the commencement of the Married Women's Property Act, 1882, if she dies intestate, the property will belong to her husband *jure mariti*: *Molony v. Kennedy*, 10 Sim. 254.

(f) As to what before the Married Women's Property Act, 1882, was considered as such separate estate, see *Haddon v. Fladgate*, 1 Sw. & Tr. 48. In the goods of Smith, *ibid.* 125. In the goods of Crofts, L. R. 2 P. & D. 18. The old cases have, however, lost their importance since the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). See *post*, Pt. II. Bk. II. Ch. II. § III.,

where the general subject of the separate property of a widow as against her husband's executors is considered.

(g) *Sturgis v. Corp*, 13 Ves. 190.

(h) *Lechmere v. Brotheridge*, 32 Beav. 353.

(i) *Herbert v. Herbert*, Proc. Ch. 44. 1 Eq. Ca. Abr. 66, 68. Accordingly, she could dispose by Will, as against her husband, of the savings out of her alimony: *Moore v. Barber*, 34 L. J., N. S., Ch. 667: *coram* Stuart, V. C.

(k) See the judgment of Sir John Nicholl, in *Brabam v. Burchell*, 3 Add. 263.

(kk) *Tappenden v. Walsh*, 1 Phillim. 352, and the authorities there cited.

mentary powers under the Married Women's Property Act (1857), 20 & 21 Vict. c. 86, who has obtained a protection order and having deserted her husband, and be deemed to have been in a like position in all respects as if she had been a *feme sole*. And by sect. 25, read with sect. 24, from the date of the order, she shall be deemed to have been in the life of her husband, as if she had acquired, or become entitled to, without specifying the property, granted to one of her

The law as to the rights of married women, and as to their rights in property, has been completely altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The Act, 1870 (43 & 44 Vict. c. 86), only affected testamentary powers, so far as it brought within the scope of the Act, earnings, and general property, and gave married women the same rights in the goods of this Act as if they were *feme sole*.

(l) In the goods of Faraday, 2 Sw. & Tr. 513. The registrar is directory in the goods of Faraday, 2 Sw. & Tr. 513. As to the property

mentary powers under special circumstances, for the Divorce Act (1857), 20 & 21 Vict. c. 85, sect. 21, enacts that a wife who has obtained a protection order by reason of her husband having deserted her shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in like position in all respects, with regard to property, as she would be if she had obtained a decree of judicial separation. And by sect. 25, referring to property acquired by the wife from the date of the sentence of judicial separation, it is provided that "such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." Under these enactments a woman having been deserted by her husband obtained a protection order by reason of his desertion. On her death, in the life of her husband, intestate, the Court decreed letters of administration, limited to such personal property as she had acquired, or become possessed of, since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin (*l*).

The law as to the testamentary powers of married women, and as to their rights of property generally, has been completely altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which repealed the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93). The earlier statute only affected testamentary powers of married women in so far as it brought within separate property the wife's personal earnings, and generally gave her a right of acquiring property independently of her husband. The Act of 1882 expressly gives married women testamentary powers. The material sections of this Act are the following:—

married women prior to Married Women's Property Act, 1882.

Will of *feme covert* of property acquired after a protection order : after a judicial separation.

Testamentary powers of married women under the Married Women's Property Act.

(1) In the goods of Worman, 1 Sw. & Tr. 513. The requirement in the statute as to the entry of the protection order with the registrar is directory only : In the goods of Paraday, 2 Sw. & Tr. 609. As to the property to which

the wife becomes entitled as executrix or administratrix since the sentence of separation or commencement of desertion, see stat. 21 & 22 Vict. c. 108, s. 7 ; *Bathe v. Bank of England*, 4 K. & J. 564. *Post*, Pt. II. Bk. IV. Ch. II.

Sect. 1 (sub-s. 1). "A married woman shall in accordance with the provisions of this Act be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee" (ll).

Sect. 2. "Every woman who marries after the commencement of this Act" (1 Jan., 1883) "shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid" (i.e., by will or otherwise as if she were a *feme sole*), "all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sect. 4. "The execution of a general power by Will of a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Sect. 5. "Every woman married before the commencement of this Act" (1 Jan., 1883) "shall be entitled to have and to hold and to dispose of in manner aforesaid" (i.e., by Will or otherwise as if she were a *feme sole*) "all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act (m), including any

(ll) It is only in accordance with the provisions of the Act that this sub-section gives power to a married woman to dispose of her property by Will as her separate property, that is to say, in the case of a woman married after the commencement of the Act, in accordance with section 2, of the property in that section mentioned; in the case of a woman

married before the commencement of the Act in accordance with section 5 of the property in that section mentioned. *Re Cuno*, 43 C. D. 12.

(m) Property, the title to which, whether vested, or contingent, in reversion, or remainder, is acquired before the commencement of the Act, does not come within this section though it falls into

wages, earnings, money, by her as aforesaid

Sect. 23. "For the representative of a separate estate, having subject to the same living."

The general effect of women married would seem to be that dispose by Will of a (n) has, whether sole, and the property regard to women married capacity is limited after that date, including property gained or acquired

One consequence of women to acquire property and dispose of it by specifying in the grant Will annexed, the property have been made, has been anything done or provided Rules 15 and 18, Appendix, which enact that the grant the separate power or authority under to have been made. with Will annexed, shall probate or letters of without any exception

possession after the Act. 31 C. D. 402.

(mm) See section 2 above

(n) *Re Price*, 28 C. D. 7

(nn) Sect. 5. "As af

wages, earnings, money and property so gained or acquired by her as aforesaid" (*i.e.*, in sect. 2).

Sect. 23. "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

The general effect of this Act on the testamentary capacity of women married on or after the 1st January, 1883 (*mm*), would seem to be that a married woman can, during coverture, dispose by Will of all property which she then (during coverture) (*n*) has, whether real or personal, as if she were a *feme sole*, and the property limited to her separate use; while with regard to women married before that date their testamentary capacity is limited to property to which their title accrues after that date, including any wages, earnings, money or property gained or acquired by her as aforesaid in the Act (*nn*).

One consequence of the change in the capacity of married women to acquire property and hold it as separate property and dispose of it by Will has been that the old rule as to specifying in the grant of probate, or administration with the Will annexed, the power under which the Will purported to have been made, has been repealed (except in so far as concerns anything done or proceeding taken in accordance with it) by Rules 15 and 18, April, 1887, P. R. (Non-Contentious Business), which enact that it shall not be necessary to recite in the grant the separate personal estate of the testatrix or the power or authority under which the Will has been or purports to have been made. The probate, or letters of administration with Will annexed, shall take the form of ordinary grants of probate or letters of administration with Will annexed, without any exception or limitation (*o*).

cessation after the Act. *Reid v. Reid*, 31 C. D. 402.

(*mm*) See section 2 above.

(*n*) *Re Price*, 28 C. D. 709.

(*nn*) Sect. 5. "As aforesaid"

would seem to be her personal earnings after marriage as defined in sect. 2 of the Act.

(*o*) *Re Price*, 12 P. D. 137.

It has been pointed out (*p*) that since the Judicature Act the jurisdiction of the Probate Division is not limited by the rule established by the case of *Barnes v. Vincent* (*q*) by the Judicial Committee of the Privy Council in respect of the Ecclesiastical Courts, and in 1878 it was decided that when the Will of a married woman is tendered for probate on the ground that she had separate property and the probate is contested, if the Court is satisfied that there is separate property it has power to grant probate of all such property as the testatrix has power to dispose of, without deciding what that property is, but it is in general the duty of the Court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists (*r*).

The Will of a married woman dealing only with realty, but appointing executors, is entitled to probate where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882 (*s*).

Property acquired by the wife after husband's death.

If a wife acquired any property after her husband's death, it could not pass by a Will made during her coverture, though by the consent of her husband: for at the time of making the Will she was inestable as to that property (*t*). And the law in this respect remained, it should seem, unaltered, notwithstanding that, by the 24th section of the Wills Act (1 Vict. c. 26), every Will is to be construed to speak and take effect as if it had been executed immediately before the death of the testatrix, unless a contrary intention shall appear by the Will: for the effect of that is not to make a Will valid which was invalid in its inception, but to give a rule for the construction of a valid testamentary instrument (*u*). Neither, it would seem, is it altered in this respect by the Married Women's Property Act, 1882 (*x*).

(*p*) *Ante*, p. 52.

(*q*) 5 Moo. P. C. 201.

(*r*) In the goods of Tharp, 3 P. D. 76.

(*s*) In the goods of Cubbon, 11 P. D. 169. And see In the goods of Hornbuckle, 15 P. D. 149.

(*t*) *Scammell v. Wilkinson*, 2 East, 556. *Swinb. Pt. 2*, s. 9, p. 3.

(*u*) *Price v. Parker*, 16 Sim. 198, 202. *Willock v. Noble*, L. R. 7 H. of L. 580. See *ante*, p. 45, n. (*t*).

(*x*) See *Price*, 28 C. D. 709.

If a *feme sole* make a Will: and although made before marriage a republication (*y*).

A Will of a *feme sole* powers vested in her revoked by her surviving

A woman whose husband may make a Will, and so where a married woman made a Will, probate of the property bequeathed by her husband's conviction for treason from the government transported for life (b) as to the general rule by Will without the effect of the Will.

Where a married woman died in Spain, she had full power to make a Will, and the property she bequeathed by Will was probated in that country (*d*).

Persons incapable

Formerly traitors and persons whose conduct was incapable of being a Will.

(*y*) *Post*, Pt. I. Bk. II. s. 1.

(*z*) *Morwan v. Thomas*, Hag. 239. *Trimmell v. Bay*, 537, 541. *Bishop*, C. D. 194.

(*a*) *Portland v. Producers*, 14. *Compton v. Collinson*, C. C. 385.

If a *feme sole* makes her Will, and afterwards marries, such subsequent marriage is a revocation, and entirely vacates the Will: and although she should survive the husband, a Will made before marriage will not revive upon his death, without a republication (y).

Will made by a wife before marriage.

A Will of a *feme covert*, made during coverture, in virtue of powers vested in her under her marriage settlement, is not revoked by her surviving her husband (z).

Will made by wife during marriage not revoked by her surviving her husband.

A woman whose husband is banished by Act of Parliament may make a Will, and act in every respect as a *feme sole* (a). So where a married woman, whose husband was a convict, made a Will, probate thereof was granted, on proof given that the property bequeathed was acquired by her subsequently to her husband's conviction, though he had received a conditional pardon from the governor of the colony whither he had been transported for life (b). And the Queen consort is an exception to the general rule; for she may dispose of her chattels by Will without the consent of her lord (c).

A woman whose husband is banished, or convict.

The Queen consort.

Where a married woman was a native of Spain, and domiciled there, and it appeared, upon affidavit, that, by the law of Spain, she had full power and authority to bequeath, as a *feme sole*, the property she brought her husband on her marriage, probate was granted of her Will, made according to the law of that country (d).

Will of married woman, native of, and domiciled in, a foreign country.

SECTION III.

Persons incapable from their Criminal Conduct.

Formerly traitors and felons were from their criminal conduct incapable of making Testaments from the time of

Traitors and felons.

(y) *Post*, Pt. I. Bk. II. Ch. III.

(b) In the goods of Martin, 2 Robert. 405. In the goods of Coward, 11 Jur. (N. S.) 569. S. C., 34 L. J. (N. S.) P. M. & A. 120.

(z) *Morwan v. Thompson*, 3 Hag. 239. *Trimmell v. Fell*, 16 Sav. 537, 541. *Bishop v. Wall*, C. D. 194.

(c) 2 Black. Comm. 498.

(a) *Portland v. Prodgers*, 2 Vern. 104. *Compton v. Collinson*, 2 Bro. C. C. 385.

(d) In the goods of Maraver, 1 Hag. 498. See *post*, Pt. I. Bk. IV. Ch. IV. § VI.

their conviction: for then their goods and chattels were no longer at their own disposal, but forfeited to the King (e). But if a convict, traitor, or felon obtained the King's pardon, and was thereby restored to his former estate, then he might make his Testament, as if he had not been convicted (f). And if he had goods as executor to another the same were not forfeited by conviction, whence it followed of such goods he might make his Will (g). Now, however, that forfeiture of lands and goods for treason and felony has been abolished by stat. 33 & 34 Vict. c. 23, it would seem to follow that traitors and felons are no longer incapacitated from making Wills.

Felo de se.

Neither could a *felo de se* make a Will of goods and chattels; for they were forfeited by the act and manner of his death (h); although he might make a devise of his lands, for they were not subjected to any forfeiture (i). But though the goods were forfeited so that the Will could not operate on them, it did not follow that he was incapable of making a Will and appointing an executor; and Sir C. Cresswell granted probate of the Will of a person who had been found *felo de se* by a coroner's inquest, acting, it should seem, on the distinction between the operative effect of a testamentary paper and its title to probate (k). Indeed, probate may have been requisite in such a case, not only for the purpose of passing property held by the deceased *in autre droit*, but also to enable the executor to exercise his undoubted right to traverse the inquisition (l). But now it would seem to follow from the above statute that a *felo de se*

(e) 2 Black. Comm. 499. Swinb. Pt. 2, ss. 12, 13. Godolph. Pt. 1, c. 12.

(f) Swinb. Pt. 2, s. 12, pl. 3. Godolph. Pt. 1, c. 12, pl. 1.

(g) Godolph. Pt. 1, c. 12, s. 2. 4 Burn, Ecc. L. 61.

(h) 2 Black. Comm. 499. Swinb. Pt. 2, s. 20. See *post*, Pt. II. Bk. III. Ch. IV. as to the executors or administrators of the deceased tra-

versing an inquisition or presentment of *felo de se*.

(i) 3 Inst. 55. 4 Burn, Ecc. L. 62.

(k) In the goods of Bailey, 2 Sw. & Tr. 156.

(l) See *post*, Pt. II. Bk. III. Ch. IV. as to the executors or administrators of the deceased traversing an inquisition or presentment of *felo de se*.

is no longer incapacitated from making Wills of goods and chattels.

Outlaws are incapable of making Wills of goods and chattels. The outlawry subsists during that time, and no personal action may, it is said, be brought against him for he may have died before the King: and the King may reverse the outlawry.

Before the stat. 5 Geo. IV. c. 64, whether an excommunicated person could make a Will, but, by that statute, except in certain cases, parties excommunicated were incapable of making a Will. As for persons who are by the civil law (as usurers, libellers) considered as incapable of making a Will, common law their testaments are void.

(m) See stat. 33 & 34 Geo. IV. c. 1.

(n) 2 Black. Comm. 499. Godolph. Pt. 1, c. 12, s. 2. Pt. 2, s. 21, pl. 4. But it is said that he who is outlawed may make a Will of his lands; for he is not forfeited: Swinb. Pt. 2, s. 20, pl. 7.

is no longer incapacitated from making a Will of goods and chattels.

Outlaws are incapable of making a Will (*m*), as long as the outlawry subsists; for their goods and chattels are forfeited during that time (*n*). But a man outlawed in a personal action may, it is said, in some cases make executors: for he may have debts upon contract which are not forfeited to the King: and those executors may have a Writ of Error to reverse the outlawry (*o*).

Before the stat. 53 Geo. III. c. 127, there was some doubt whether an excommunicate person could make a Will (*p*); but, by that statute, excommunication is not to be pronounced, except in certain cases; and by section 3, in those cases, parties excommunicated shall incur no civil incapacity whatever. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp), by the common law their testaments are good (*q*).

Outlaws.

Persons excommunicate.

Persons guilty of crimes short of felony.

(*m*) See stat. 33 & 34 Vict. c. 23, s. 1.

(*n*) 2 Black. Comm. 499. Godolph. Pt. 1, c. 12, s. 8. Swinb. Pt. 2, s. 21, pl. 4. But it seemeth, that he who is outlawed in an action personal may make his testament of his lands; for they are not forfeited: Swinb. Pt. 2, s. 21, pl. 7.

(*o*) Shaw v. Cutleris, Cro. Eliz. 851. 4 Burn's Ecc. L. 62. Wentw. c. 1, p. 37, 14th edition. Outlawry in civil proceedings has now been abolished. 42 & 43 Vict. c. 59, s. 3.

(*p*) Swinb. Pt. 2, s. 22. Wentw. c. 1, p. 38. 4 Burn's Ecc. L. 62.

(*q*) 2 Black. Comm. 499.

CHAPTER THE SECOND.

OF THE FORM AND MANNER OF MAKING A WILL OR
CODICIL.

BEFORE the passing of the statute 1 Vict. c. 26 (*Act for the Amendment of the Laws with respect to Wills*), no solemnities of any kind were necessary for the making of a Will of personal estate. The fifth section of the Statute of Frauds, which required the formalities of signature and attestation for a devise of lands, did not extend to Wills of personal property. The nineteenth section made it necessary that they should, generally speaking, be reduced *into writing* in the testator's lifetime; inasmuch as it was thereby enacted, that no nuncupative Will (where the estate thereby bequeathed exceeded the value of 30*l.*) should be good, except under certain circumstances which will be hereafter pointed out (*g*). But no other formality whatever was necessary to give them effect and operation. Whence it often happened that a Will, intending to dispose of both real and personal estate, was inoperative as to the former, and at the same time a perfect disposition of the latter.

1 Vict. c. 26

The Wills Act repeals the Statute of Frauds, so far as it relates to Wills (*viz.* sects. 5, 6, 12, 19, 20, 21, 22, and 29), and contains enactments, the result of which is, that, on or after the first day of January, 1838, the solemnities prescribed by the Act are required to render valid any Will or other testamentary disposition of every description of property without distinction; so that the same formalities of execution and attestation are necessary, whether the instrument disposes of real or of personal estate.

(a) *Post*, sect. vi.Ch. II.] *Of the*

These enactments of the Statute of

Sect. 9. "No Will [position] (b) shall be executed in manner shall be signed at or by some other person and such signature of the testator in the presence of the same time, and subscribe the Will in the form of attestation

Sect. 11. "Provided that any soldier, barrister, mariner or seaman, personal estate as this Act."

The construction after (f).

Sect. 13. "Every Will required, shall be thereof."

It must, however, extend to any Will the law with respect to former editions of the

It may here be seen is properly executed executed pursuant to

(b) See the Interpretation Act, 1889, sect. 1, *Preface*. See also 478, 479.

(c) A statutory construction has been put upon these provisions by the Statute 15 Vict. c. 24, p. 67.

(d) See *post*, p. 104. *Post*, p. 104.

These enactments are contained in the following sections of the Statute of Victoria.

Sect. 9. "No Will [or codicil, or other testamentary disposition] (b) shall be valid, unless it shall be in writing, and executed in manner hereafter mentioned; (that is to say,) it shall be signed at the foot or end thereof (c) by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator; but no form of attestation shall be necessary."

Every Will shall be in writing and signed by the testator in the presence of two witnesses at one time :

Sect. 11. "Provided always, and be it further enacted, that any soldier being in actual military service (d), or any mariner or seaman being at sea (e), may dispose of his personal estate as he might have done before the making of this Act."

exceptions as to Wills of soldiers and mariners :

The construction of this section will be considered hereafter (f).

Sect. 13. "Every Will executed in manner heretofore required, shall be valid without any other publication thereof."

publication not requisite.

It must, however, be observed, that this statute does not extend to any Will made before January 1, 1838 (g). As to the law with respect to Wills made at an earlier date, see the former editions of this work, Pt. I. Bk. II. Ch. II.

The statute does not extend to Wills made before Jan. 1, 1838.

It may here be remarked, that where a Will without date is properly executed according to the former law, but not executed pursuant to the new Act, and the case is altogether

Presumption as to the time when a Will without date was made.

(b) See the Interpretation clause, sect. 1, *Preface*. See also 3 Curt. 478, 479.

(c) A statutory construction has been put upon these words by stat. 15 Vict. c. 24. See *post*, p. 67.

(d) See *post*, p. 104.
(e) *post*, p. 105.

(f) See *post*, pp. 104, *et seq.*

(g) But every Will re-executed or republished or revived by any codicil is, for the purposes of the Act, to be deemed to have been made at the time the same was re-executed, republished, or revived (sect. 34).

bare of circumstances which can afford the Court any information as to the time when the Will was made, it has been held, that the presumption is, that it was made before the Act came into operation; inasmuch as every one is presumed to know the law, and the Court, in the absence of evidence tending to a contrary conclusion, is bound to presume that the Will was executed according to the law as it stood at the time the instrument was written (*h*).

SECTION I.

Of the Signature by the Testator.

Signature of
Wills made
after Jan. 1,
1838 :
1 Vict. c. 26,
s. 9 :

With respect to the signature of a Will, made (or re-executed or republished) (*i*) on or after the 1st day of January, 1838 (*k*), it is required by the stat. 1 Vict. c. 26, s. 9, that it "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction."

signature by
mark suffi-
cient.

It seems clear that the making of a mark by the testator is a sufficient signing to satisfy the statute. It was held by the Court of Queen's Bench, in *Baker v. Dening* (*l*), that under the Statute of Frauds (s. 6), the making of a mark by a devisor, to a Will of real estate, is a sufficient signing; and that is sufficient, without reference to any question whether he could write at the time.

So in *Wilson v. Beddard* (*m*), on the trial of an issue *devisavit vel non*, directed by the Court of Chancery, Parke, B., said, that it was necessary, under that statute, that the Will should be signed by the testator, but not with his name, for his mark was sufficient if made by his hand

(*h*) *Pechell v. Jenkinson*, 2 Curt. 273. As to the presumption in the case of alterations appearing on the face of a Will, see *post*, Pt. I. Bk. II. Ch. III. § 1.

(*i*) See *supra*, p. 63, note (*g*).

(*k*) For a statement of the Law

and authorities as to Wills made prior to this date, see the former Editions of this Work: Pt. I. Bk. II. Ch. II. § 1.

(*l*) 8 A. & E. 94.

(*m*) 12 Sim. 28.

though that hand
L. Shadwell, V. C.,
correct.

These decisions
statute of Victoria
language of both A
words of the latter
lands shall be in "w
the same or by some
express directions, &
the construction of
testator's presence,
stamped the Will, b
which the testator
so that it might be
requiring his signa
Will (*o*).

Again, Wills hav

(*n*) See *Accord*. In
of Bryce, 2 Curt. 325
case a Will made sin
1838, was admitted to
motion, the testatrix ha
it with a mark, and not
ing her name did not ap
face of the instrument.
In the goods of Amiss, 2 E
post, p. 82. So where o
Douce put his mark
mentary paper in which
scribed throughout as J
the Court, on being s
affidavit that Thomas I
executed the paper, grant
thereof as his Will: In
of Douce, 2 Sw. & Tr. 51
where a Will purport
that of S. Clarke, and d
her as such for safe
one of her executors sho
her death, was execut

though that hand was guided by another person; and Sir L. Shadwell, V. C., afterwards held, that this proposition was correct.

These decisions appear to be equally applicable to the statute of Victoria as to the Statute of Frauds, for the language of both Acts in this respect is almost identical, the words of the latter being that all devises and bequests of lands shall be in "writing and signed by the party so devising the same or by some other person in his presence and by his express directions, &c." (n). Accordingly it has been held in the construction of the statute of Victoria, that when, in the testator's presence, and by his directions, another person stamped the Will, by way of signature, with an instrument on which the testator has had his usual signature engraved, so that it might be stamped on letters or other documents requiring his signature, this was a due execution of the Will (o).

Again, Wills have been admitted to probate which have Signature

(n) See *Accord*. In the goods of Bryce, 2 Curt. 325; in which case a Will made since Jan. 1, 1838, was admitted to probate, on motion, the testatrix having signed it with a mark, and notwithstanding her name did not appear on the face of the instrument. See also *In the goods of Amiss*, 2 Robert. 116, post, p. 82. So where one Thomas Douce put his mark to a testamentary paper in which he was described throughout as John Douce, the Court, on being satisfied on affidavit that Thomas Douce duly executed the paper, granted probate thereof as his Will: In the goods of Douce, 2 Sw. & Tr. 593. Again, where a Will purporting to be that of S. Clarke, and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark

against which appeared the name of S. Barrell (her maiden name), it was held, that there being no doubt of the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it: In the goods of Clarke, 1 Sw. & Tr. 22. But where the deceased who resided with her sister, prepared two Wills for their respective execution, the legacies in each and the disposition of the residue being almost identical, and by mistake executed the Will prepared for her sister, the Court held that the deceased did not know and approve of the contents of the document she executed, and refused probate of it. In the goods of Hunt, L. R. 3 P. & D. 250.

(o) *Jenkins v. Gaisford*, 3 Sw. & Tr. 93.

under an assumed name.

been signed by the testator under an assumed name, the Court being of opinion that such assumed name might stand for, and pass as, the *mark* of the testator (*p*).

Sealing not a sufficient signature.

In the construction of the Statute of Frauds, it was once considered that the putting of a seal by the testator was a sufficient signing; for that *signum* was no more than a mark, and sealing is a sufficient mark that it is his Will (*q*).

But this doctrine has been since overruled (*r*). Whence it appears to follow, that sealing would not be regarded as a signing within the statute of Victoria.

The signature under the Wills Act is required to be at the foot or end.

The Will is required by that Act to be signed "at the foot or end thereof." The Statute of Frauds merely requires that the Will shall be "signed;" and it was held, that a Will in the testator's own handwriting commencing, "I, John Styles, do declare this to be my last Will, &c." was sufficiently "signed" within that statute, although not subscribed with his name (*s*). With a view, perhaps, to prevent future controversy, as to whether a Will so signed is a complete and perfect instrument, the statute of Victoria required that the signature of the testator shall be at the foot or end of the Will.

But questions of this kind do not appear to be altogether excluded by the operation of this enactment: And a new ground of contest arose out of it, as to what may be considered a signing of the Will at the end or foot thereof.

Doubts arose whether a signature by the testator in the body of the *testimonium* or attestation clause was sufficient; and also, whether a signature below the latter clause, when it runs beneath the conclusion of the Will, was a compliance with the Act. On the question, whether the Will was well executed, if there was a blank space between the conclusion of the Will and the signature of the testator, a lamentably large number of points and decisions occurred. In the earlier

(*p*) In the goods of Glover, 5 1.

Notes of Cas. 553. In the goods of Redding, 2 Robert. 339. (*r*) Smith v. Evans, 1 Will. 313.

(*q*) Lemayne v. Stanley, 3 Lev. 249. (*s*) Coles v. Trecothick, 9 Va.

cases Sir H. Jenner in this part of the Act. concurrence with the Council (*t*), felt it in this enactment, on the any addition being made executed it. And a number of subsequent tion of a great many

This led to the p after reciting that, b enacted that no Will at the foot or end th person in his presence by sect. 1, that "ever position of the signa signing for him as af said enactment, as ex be so placed at or a opposite (*u*) to the end

(*t*) Willis v. Lowe, 5 Cas. 498. S. C. 1 Ro note (*b*). Smee v. Bryer of Cas. 20, Suppl. xii. Robert. 616. 6 Moo. B.

(*u*) A signature writ ways on the second page on the first and third which the will was wr held sufficient. In the Powell, 4 Sw. & Tr. 34. testator's signature wa partly across the last li of the will, and entirely last line, with the excep letter which touched the it was held that the will at the foot or end there goods of Woodley, 3 Sw. The same was held und

cases Sir H. Jenner Fust put a very liberal construction on this part of the Act. But afterwards that learned judge, in concurrence with the Judicial Committee of the Privy Council (t), felt it necessary to take a more rigid view of this enactment, on the ground that it was intended to prevent any addition being made to the Will after the deceased had executed it. And accordingly probate was refused in a great number of subsequent cases on this objection, and the intention of a great many testators unfortunately defeated.

This led to the passing of the stat. 15 Vict. c. 24, which, after reciting that, by the stat. 1 Vict. c. 26, it had been enacted that no Will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, proceeds to enact, by sect. 1, that "every Will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite (u) to the end of the Will (x), that it shall be apparent

Stat. 15 Vict.
c. 24.

When signature to a Will shall be deemed valid.

t) *Willis v. Lowe*, 5 Notes of Cas. 428. S. C. 1 Robert. 618, note (b). *Smee v. Bryer*, 6 Notes of Cas. 23, Suppl. xii. S. C. 1 Robert. 616. 6 Moo. B. C. 404.

(u) A signature written cross-ways on the second page of a paper, on the first and third pages of which the will was written, was held sufficient. In the goods of *Powell*, 4 Sw. & Tr. 34. Where the testator's signature was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line, it was held that the will was signed at the foot or end thereof: In the goods of *Woodley*, 3 Sw. & Tr. 429. The same was held under the stat.

15 Vict. c. 24, of a Will made in France, and signed not at the end of the Will, but at the end of a notarial minute which followed in the same sheet. Page v. *Honovau*. Den. & Sw. 278. A signature at the end of several sheets of the Will except the last has been held insufficient, the signature not being at the end of the Will. *Sweetland v. Sweetland*, 4 Sw. & Tr. 6. A Will ended on the second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and signatures of the testator and the attesting witnesses were written on the third page: the signature of

(x) For note see next page.

on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will, and that no such Will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the Will, or by the circumstance that a blank space shall intervene between the concluding word of the Will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the

the testator being opposite the clause appointing executors, the attestation clause being written beneath the signatures and ending opposite to the concluding words of the Will, and the signatures of the attesting witnesses being at the bottom of the attestation clause: It was held that the signature was so placed beside or opposite to the end of the Will that it was apparent on the face of the Will that the testator intended to give effect by his signature to the writing as his will, and that the Will was therefore entitled to probate. In the goods of Williams, L. R. 1 P. & D. 4. A Will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and attesting witnesses, which were written crossways on the second page. It was held that the Will was duly executed. In the goods of Coombs, L. R. 1 P. & D. 302. Where in a testamentary paper executed by the deceased the last sentence commenced immediately above the signature of the deceased, and was continued in three short lines to the left of it, the two last lines being somewhat below the signature, and this sentence was written before the deceased signed his name, it was

held that the execution was valid, and that the last sentence should be included in the probate. In the goods of Ainsworth, L. R. 2 P. & D. 151. A duly attested signature on the earlier pages of a Will has been held insufficient in cases where an unattested signature appeared on later pages. In the goods of Dilkes, L. R. 3 P. & D. 164; Phipps v. Hale, L. R. 3 P. & D. 166. A mark made on his deathbed by a paralysed man in the middle of a testamentary paper duly witnessed was held *insufficient*, not being signed at the foot or end. Margary v. Robinson, 12 P. D. 8. A codicil on the third sheet of a duly executed Will executed by the signature of the testator and attesting witnesses in the margin of the first sheet of the Will was held *insufficient*, Sir J. Hannen saying that "the Legislature has never departed from this standard that the execution of a testamentary paper must be signed at the foot or end thereof." In the goods of Hughes, 12 P. D. 107.

(x) Where a Will was written on a piece of parchment, and at one corner at the bottom of the parchment a piece of paper was pasted, and a stamp impressed on it, upon which paper the signatures of the testator and the attesting witnesses were subsequently

clause of attestation the clause of attestation intervening, or shall follow the names or one of the names by the circumstance that the page or other portion of the Will whereon no clause of attestation shall be written

made; it was held by Sir J. Hannen, that the signature was accepted as a signature on the Will, so as to be valid. 15 Vict. c. 24: In the goods of Clausden, 2 Sw. & Tr. 30. This decision was followed in a similar one in another case, the same judge, in Cook v. Bert, 3 Sw. & Tr. 46; and in the goods of Horsford, L. R. 3 P. & D. 211.

(y) It is to be observed that questions may still arise, as to the validity of a signature placed among the words of the *testimonium* clause, or the clause of attestation, where the testator only written his name, and otherwise subscribing the Will, that it may be contended that it does not appear whether he intended it or not for his signature to the Will. In the goods of the deceased intended by his name in the attestation clause to execute his Will, granted. In the goods of Williams, 12 P. D. 354. In the goods of Casmore, L. R. 1 P. & D. 375. In the goods of Huckvale, 1 P. D. 70. The Will in some cases precluded the testator has signed his

clause of attestation (y), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses (z), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the Will whereon no clause or paragraph or disposing part of the Will shall be written above the signature (a), or by the

Stat. 15 Vict.
c. 24.

made; it was held by Sir C. Cresswell, that the signature must be accepted as a signature on part of the Will, so as to be within the Stat. 15 Vict. c. 24: In the goods of Gausden, 2 Sw. & Tr. 362. And this decision was followed by a similar one in another case before the same judge, in *Cook v. Lambert*, 3 Sw. & Tr. 46; and see In the goods of Horsford, L. R. 3 P. & D. 211.

(y) It is to be observed that questions may still arise, as to the validity of a signature placed among the words of the *testimonium* clause, or the clause of attestation, where the testator has only written his name, without otherwise subscribing the Will, so that it may be contended that it does not appear whether he intended it or not for his signature to the Will. In the following cases the Court, being satisfied that the deceased intended by signing his name in the attestation clause to execute his Will, granted probate. In the goods of Walker, 2 Sw. & Tr. 354. In the goods of Lamore, L. R. 1 P. & D. 653. In the goods of Huckvale, L. R. 1 P. & D. 375. In the goods of Pearn, 1 P. D. 70. The Court will in some cases presume that the testator has signed his name

prior to the attestation, although there be no direct proof of that fact. In the goods of Huckvale, L. R. 1 P. & D. 375. In the goods of Pearn, 1 P. D. 70. Where the Will of the deceased had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses, and the witnesses were both dead, and no evidence could be given as to the order in which the signatures were made, the Court nevertheless decreed probate of the Will: In the goods of Puddephatt, L. R. 2 P. & D. 97. See also in the Goods of Jones, 46 L. J. P. & M. 80. Where the Will was in the handwriting of the testator and his name formed the concluding words of the last clause of the Will, it was admitted to probate, the Court (Sir C. Cresswell) being satisfied that the name was intended to be a signature: *Trott v. Skidmore*, 2 Sw. & Tr. 12. As to what the Act means by "among the words of the testimonium clause," see In the goods of Mann, 28 L. J., P. M. & A. 50.

(z) In the goods of Jones, 4 Sw. & Tr. 1.

(a) In the goods of Williams, L. R. 1 P. & D. 4. *Hunt v. Hunt*, L. R. 1 P. & D. 209. In the goods



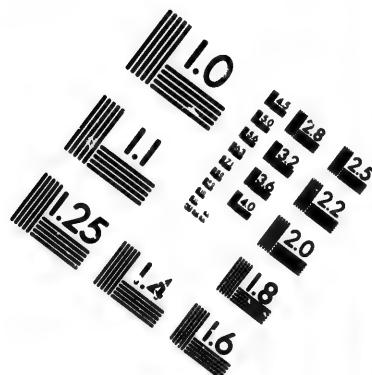
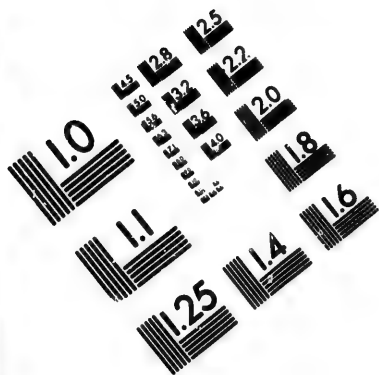
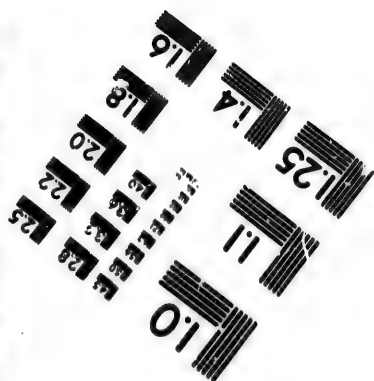
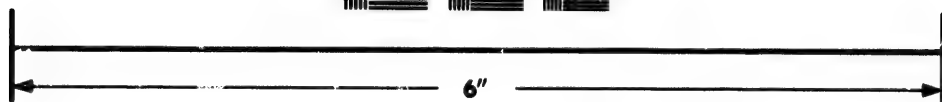
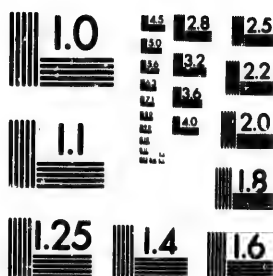


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circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the Will is written to contain the signature (b); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (c), or which follows it (d), nor shall it

of Jones, 4 Sw. & Tr. 1. In the goods of Wright, 4 Sw. & Tr. 35.

(b) A Will was written across the second and third sides of a sheet of note-paper, the lower part of such sides being left blank, the attestation clause and signatures of the testator and witnesses were written at the back of the Will across the top of the first and fourth sides of the paper. The testator wrote the Will in the presence of the witnesses immediately before he executed it. The Court, being satisfied that the paper was written before the signatures were put there, granted probate (distinguishing the case from *In the goods of Hammond*, 3 Sw. & Tr. 90, in which there was no evidence of the paper being written before the signatures). In the goods of Archer, L. R. 2. P. & D. 252.

(c) A Will contained a reference to "executors hereafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature. It was held that this clause being underneath the signature, the probate must go without it. In the goods of Dallow, L. R. 1 P. & D. 189. Where from the obvious sequence and sense of the context it appears to the satisfaction of the Court

that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate. In the goods of Kimpton, 3 Sw. & Tr. 427. A Will was written on the second and third sides of a sheet of foolscap, on the first side of which there was a lithographed form of Will. The deceased signed her name in the presence of witnesses at the foot of the lithographed form, and it was held that the first page might be treated as the last page of the Will, and that the paper was entitled to probate. In the goods of Wotton, L. R. 3 P. & D. 159. The deceased in his Will, which was written by himself on the first side of a half-sheet of paper, gave his property to his wife for life, and then intending to dispose of certain freehold cottages on the death of his wife, commenced a sentence which he left incomplete. After the incomplete sentence was an asterisk and the words "see over." The Will which covered the whole of the first side was executed at the bottom of that

(d) For note see opposite page.

give effect to any signature shall be n

Sect. 2. "The p applied to every W probate has not alre competent jurisdiction of such Will, the jurisdiction of possessed or enjoyed be entitled thereto of such Will, or t decided to be in so persons claiming u

side, and at the top of side was another aster devise of the cottage daughter. This bequesten before the Will was It was held that the wo second side were in th an interlineation, and f of the Will. In the go L. R. 2 P. D. 214. S the goods of Malen, 54 M. 91. In the goods wood [1892] P. 7. See ations and Interlineatio et seq.

(d) In order to get objection that the Will signed at the foot or end, has formerly, in some case itself justified in regard tion running below the si forming no part of the granting probate exclusi portion. *Keating v. Brook* of Cas. 253, 260. But in modern case of *Sweetland*, 4 Sw. & Tr. 6, it is that "the Court would justified in fixing upon a in the midst of what th intended as his Will, and

give effect to any disposition or direction inserted after the signature shall be made (c).

Sect. 2. "The provisions of this Act shall extend and be applied to every Will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such Will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such Will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the Will, by a Court of competent

Stat. 15 Viet.
c. 24.

Act to extend
to certain Wills
already made.

side, and at the top of the second side was another asterisk and a devise of the cottages to his daughter. This bequest was written before the Will was executed. It was held that the words on the second side were in the nature of an interlineation, and formed part of the Will. In the goods of Birt, L. R. 2 P. D. 214. See also In the goods of Malen, 54 L. J., P. & M. 91. In the goods of Greenwood [1892] P. 7. See *post*, Alterations and Interlineations, p. 122 *et seq.*

(d) In order to get rid of the objection that the Will was not signed at the foot or end, the Court has formerly, in some cases, thought itself justified in regarding a portion running below the signature as forming no part of the Will, and granting probate exclusive of that portion. *Keating v. Brooks*, 4 Notes of Cas. 253, 260. But in the more modern case of *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, it is laid down that "the Court would not be justified in fixing upon a signature in the midst of what the testator intended as his Will, and treating

it as an execution of all that preceded, and granting probate of so much of the Will to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes. It does not become the Court in a laudable anxiety to give effect to the document to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to mend the testator's blunder"—by Lord Penzance. This has been followed in the cases of *In the goods of Dilkes*, L. R. 3 P. & D. 164; and *Margary v. Robinson*, 12 P. D. 8.

(e) Where the testator, after signing his name to his Will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature, and immediately afterwards the witnesses signed their names, the Court held that the testator did not sign or acknowledge his signature to the Will, as containing such clause, and that probate should issue without it: In the goods of *Arthur*, L. R. 2 P. & D. 273.

jurisdiction, in consequence of the defective execution of such Will."

Interpretation of "Will."

Sect. 3. "The word 'will' shall, in the construction of this Act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of Her Majesty Queen Victoria."

Short title of Act.

Sect. 4. "This Act may be cited as 'The Wills Act Amendment Act, 1852.'"

Blank spaces in the body of a Will are unobjectionable.

It should be observed that there is no provision in either of these Acts that the Will shall be written continuously. Therefore it has been held that if a Will is otherwise duly executed, it is no objection that it contains blank spaces in the body of it (f).

What is a sufficient signing by "some other person:"

The stat. 1 Vict. c. 26, s. 9, enacts that the Will may be signed either by the testator, "or some other person in his presence and by his direction."

The signature by the direction of the testator, may it appears notwithstanding the contrary view expressed by Lord St. Leonards in his essay on the Law of Wills, p. 38, be by one of the attesting witnesses (g), and if the person signing for the testator, signs in his own name and not in that of the testator, such signature is sufficient (h).

Whether the acknowledgment by the testator of a signature suffices, without showing who wrote it.

Where it is proved that the testator duly acknowledged a signature to the attesting witnesses, it has been considered sufficient, *prima facie*, without proving that the signature is in his handwriting, or that it was made "by some other person in his presence and by his direction" (i).

Signature where the Will consists of several sheets:

It is not necessary that all the sheets or papers of which a Will consists should be signed by the testator: or that they should all be connected together: It is enough if they were in

(f) *Corneby v. Gibbons*, 6 Notes of Cas. 679. *Re Corlier*, 1 Robert. 669. *Re Kirby*, 6 Notes of Cas. 693.

(g) In the goods of *Bailey*, 1 Curt. 914. *Smith v. Harris*, 1

Robert. 262.

(h) In the goods of *Clark*, 2 Curt. 329.

(i) *Gaze v. Gaze*, 3 Curt. 456, per Sir H. Jenner Fust.

the same room where presumed, *prima*

So where a duly and alterations, at the testator and signature and attestation clauses written about written at different

Of the Attestation

The stat. 1 Vict. testament or codicil shall be valid unless acknowledged by the witnesses present at the test and shall survive the testator, but no form

The Statute of Frauds, that it should show the presence of the devisee

It will be observed that two in the number of differences between

The Statute of Frauds should attest and a construction of this the testator actually

(4) *Gregory v. The Proctor*, 4 Notes of Cas. 85. *Marsh v. Tr.* 528. *Rees v. P. & D.* 84.

(5) In the goods of *Sw. & Tr.* 419.

the same room where the execution took place; and it must be presumed, *prima facie*, that they were so (*k*).

So where a duly executed Will followed by several additions and alterations, at the end of which appeared the signature of the testator and attesting witnesses, it was held that the signature and attestation clause applied to all the dispositive clauses written above them, although these had been apparently written at different times (*l*).

or of several clauses written at several times.

SECTION II.

Of the Attestation of Wills and Codicils of personal estate.

The stat. 1 Vict. c. 26, s. 9 (*m*), enacts, that no Will (or testament or codicil, or any other testamentary instrument), shall be valid unless the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary."

As to Wills, &c., made on or after Jan. 1, 1838:

the signature must be made or acknowledged in the presence of two or more witnesses present at one time, and they shall attest and subscribe the Will in testator's presence:

The Statute of Frauds required, with respect to a Will of lands, that it should be "attested and subscribed in the presence of the deviser, by three or four credible witnesses."

It will be observed, that besides the change from three to two in the number of witnesses, there are several important differences between the exigencies of the two statutes.

The Statute of Frauds merely required, that the witnesses should attest and subscribe *the Will*; and it was held in the construction of this enactment, that it was unnecessary for the testator actually to sign his Will in the presence of the

what is a sufficient acknowledgment of the testator's signature to the witnesses:

(*k*) Gregory v. The Queen's Proctor, 4 Notes of Cas. 620, 639. *Post*, p. 85. Marsh v. Marsh, 1 Sw. & Tr. 528. Rees v. Rees, L. R. 1 P. & D. 84.

(*l*) In the goods of Catrall, 3 Sw. & Tr. 419.

(*m*) As to the law with respect to Wills made before 1 Jan., 1838, the date of the commencement of the Will Act, see former editions of this work. Pt. I. Bk. II. Ch. II.

§ II.

three witnesses who subscribed the same; but that any acknowledgment before them, that it was his Will, made their attestation and subscription complete (n). It was further held, that it was sufficient if the testator acknowledged *in fact*, though not in words, to the witnesses that the instrument was his Will, even though such acknowledgment conveyed no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing; and consequently, that if the witnesses subscribed their names as witnesses, at the testator's request, *without seeing his signature*, or being informed of the nature of the instrument, the statute was satisfied (o). But the statute of Victoria requires further, that the *signature* of the testator "shall be made or acknowledged by the testator" in the presence of the two attesting witnesses. Soon after the Act came into operation, a doubt appears to have been suggested (p), whether an acknowledgment of the signature was intended to be effectual in any other case than where the signature had been made "by some other person" by the direction of the testator: But Sir H. Jenner Fust was clearly of opinion, that the statute meant, that whether the signature be made by the testator, or by some other person, if it be acknowledged by the testator in the presence of the two witnesses, the execution shall be good. A more difficult question hereupon arises, in cases where the signature is made by the testator, but not in the presence of the attesting witnesses, as to what shall be a sufficient acknowledgment of it by him in their presence (q). The result of the cases

(n) *Ellis v. Smith*, 1 Ves. Jun. 11. *Casement v. Fulton*, 5 Moo. P. C. 138, by Lord Brougham.

(o) *White v. Trustees of the British Museum*, 6 Bing. 310. *Wright v. Wright*, 7 Bing. 457. *Johnson v. Johnson*, 1 Cr. & M. 140.

(p) In the goods of *Regan*, 1 Curt. 908.

(q) The whole law as to what is a

sufficient acknowledgment of a signature, not written by the testator in the presence of the witnesses, has recently been very fully discussed in the cases of *Blake v. Blake*, 7 P. D. 102; *Wright v. Sanderson*, 9 P. D. 149, and *Daintree v. Fasulo*, 13 P. D. 67, 102, and the result seems to be that where the evidence is such that the Court concludes that

appears to be, that his signature visible to the witnesses (or either of them) did not see the signature: at the testator spoke of the attested his Will, or stated signed the Will, but were not able to see that is not a sufficient acknowledgment. In *Blake v. Blake*, the Court decided that to constitute a sufficient acknowledgment of the Will, the testator must at the time of making the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such case it is immaterial whether the signature be, in fact, made by the testator, or by some other person, at the time of attestation, whether the testator was present, or not, when the signature was made, or whether the signature was made on paper to be attested, or on paper that his signature was written on the paper. In this case, the Court, after expressing their disapproval of the law as laid down in *Dr. Lushington v. Lushington*, 1 Rob. 14, and in the judgment of Sir C. Cresswell in *Gwillim v. Gwillim*, 3 P. D. 200, and dissents from the judgment of Lord Penzance, in *Beckett v. Howe*, L. R. 10, 11, and that Sir C. Cresswell has laid down the doctrine that, where the witnesses were unable to see the signature, the testator's signature, if he had signed would be sufficient. But it is to be observed, that in the absence of affirming evidence, that the witnesses did not see the signature, they could not have seen, the signature of the testator, the Court will presume (unless there is evidence to the contrary), in the absence of affirming evidence, that the witnesses did not see the signature.

appears to be, that where the testator produces the Will, with his signature visibly apparent on the face of it, to the wit-

the witnesses (or either of them) did not see the signature, the fact that the testator spoke to the witnesses of the attested document as his Will, or stated that he had signed the Will, but the witnesses were not able to see his signature that is not a sufficient acknowledgment. In *Blake v. Blake*, it was decided that to constitute a sufficient acknowledgment, within sect. 9 of the Wills Act, the witnesses must at the time of acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper. In this case, Jessel, M.R., after expressing his approval of the law as laid down by Dr. Lushington in *Hudson v. Parker*, 1 Rob. 14, discusses the judgment of Sir C. Cresswell in *Gwillim v. Gwillim*, 3 Sw. & Tr. 200, and dissents from the view of Lord Penzance, expressed in *Beckett v. Howe*, L. R. 2 P. & D. 1, that Sir C. Cresswell meant to lay down the doctrine that, if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. But it is to be observed that in the absence of affirmative proof that the witnesses did not see, or could not have seen, the signature of the testator, the Courts will, (unless there is evidence to the contrary), in the absence of fraud, presume in a case where there is

a proper attestation clause, or where the evidence shows that the testator knew the law, that the attesting witnesses saw the acknowledged signature. *Woodhouse v. Balfour*, 13 P. D. 2; not so, however, where there is no formal attestation clause and no affirmative evidence that at the time of attestation the deceased's name was on the paper; for the mere production of it to the witnesses with a request that they will sign it as a paper, is not in itself sufficient to justify the Court in drawing the inference that it was already signed by the deceased: *Fischer v. Popham*, L. R. 3 P. & D. 246. In *Blake v. Knight*, 3 Curt. 547, 561, in dealing with the question of what evidence should lead the Court to pronounce for or against the validity of a Will duly attested on the face of it, Sir H. Jenner Fust said: "The first point to consider is whether it is absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the Will was actually signed in their presence or actually acknowledged in their presence? is it absolutely necessary under all circumstances that the witnesses should concur in stating that these facts took place? or is it absolutely necessary where the witnesses will not swear positively that the Court should pronounce against the validity of the Will. I think these are not absolute requisites to the validity of a Will. I think the Court must take into consideration all the circumstances of the case and judge from them collectively whether there was not at

nesses, and requests them to subscribe it, this is a sufficient

least an acknowledgment of a signature already existing on the face of the Will at the time of attestation? The testator must have known how to give validity to a testamentary paper in the year 1838. No doubt the memory of the witnesses fails them with reference to circumstances happening nearly four years ago. The Court cannot safely trust to the memory of witnesses under such circumstances: it must attend to the facts of the case, and say whether it is satisfied that the name of the deceased was written to the Will when the witnesses signed it, whether it was signed in their presence, or signed beforehand and acknowledged in their presence." And the same learned judge in *Cooper v. Bockett*, 3 Curt. 659, 663 (affirmed in the Privy Council), said that "where the *res gestæ* do not confirm the impressions of the witnesses the Court must look at the circumstances of the case as it is always at liberty to do." In *Wright v. Sanderson* (*ubi sup.*), Lord Selborne, after quoting these two judgments of Sir H. Jenner Fust, and after stating that the reasons given by Dr. Lushington for the decision of the Judicial Committee in *Lloyd v. Roberts*, 12 Moo. P. C. 165, proceed on the same principles and upon the presumption of the due execution of a holograph will on the face of which everything is regular, and where there is no question of fraud, affirms the judgment of Sir J. Hannen, pronounced for the validity of a holograph codicil in a case in which neither of the attesting witnesses could say anything as to what writing was on

the paper, nor as to whether the testator's signature was there when they signed, and where both said that they did not see him sign. Lord Justice Fry in the same case held that as the codicil *ex facie* appeared to be properly executed and the presumption *omnia rite esse acta* was strengthened by the conduct of the testator, which showed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect. So, too, in *Daintree v. Fasulo*, 13 P. D. 67, 102. Butt, J., in holding that a codicil was entitled to probate in a case in which the witnesses were not aware that the paper was a testamentary paper, and had no clear recollection as to the signature, points out that his decision is in accordance with that of Sir H. Jenner Fust in the case of *In the goods of Thomson*, 4 Not. of Cas. 643, and that that case notwithstanding the observations of Lord Penzance in *Pearson v. Pearson*, L. R. 2 P. & D. 451, was not inconsistent with the decision of the Privy Council in *Ilott v. Genge*, 4 Moo. P. C. 265, because the leading feature in *Ilott v. Genge*, viz., that the witnesses were not allowed to see the testator's signature, which was covered up, did not exist in the case of *In the goods of Thomson*. This view was affirmed in the Court of Appeal.

It will be observed that, in the case of *Blake v. Blake* also, the

acknowledgment are unable to see them in to sign, in instrument they a Cresswell, the wit his signature on a They saw no writi witnessed was on the middle: On t was produced for p there was no evide

signature was cover may be that there is between the rule in th the testator acknowledged ture, and in cases wh in the presence of t as to what opportu bility there must be of seeing what it is tha See *Smith v. Smith*, L. 143. On the applica maxim "*omnia presu esse acta*," see Woodh four, 13 P. D. 2, and p

(r) In the following was held to be a suffic ledgment: *Gaze v. Gaze*, *Blake v. Knight*, *ib.*, 54 *v. Keigwin*, *ib.*, 607. of Davis, *ib.*, 748. I of Ashmore, *ib.*, 756. Bockett, 3 Curt. 649; 419. In the goods o 4 Not. of Cas. 643. L 6 Not. of Cas. 704. Jackson, 6 Not. of C Burgoyne v. Showler, Bosanquet v. Bosanq 677. Lloyd v. Rober P. C. 158. Gwillim v Sw. & Tr. 200. Vir Butler, 3 Sw. & Tr. 580 Howe, L. R. 2 P. & D. 4. Ingleant, L. R. 3 P.

acknowledgment of his signature (r) : But not where they are unable to see the signature, and the testator merely calls them in to sign, without giving them any explanation of the instrument they are signing (s). So in a case before Sir C. Cresswell, the witnesses were invited by the testator to witness his signature on a paper which appeared to them to be a blank : They saw no writing whatever on it, and the signature they witnessed was on the fourth side of a sheet of paper folded in the middle : On the first side of that sheet, when the paper was produced for probate, there appeared to be a codicil ; but there was no evidence that anything was written on the paper

signature was covered up. It may be that there is a distinction between the rule in the cases where the testator acknowledges his signature, and in cases where he signs in the presence of the witnesses, as to what opportunity or possibility there must be of the witnesses seeing what it is that is written.

See *Smith v. Smith*, L. R. 1 P. & D. 143. On the application of the maxim "*omnia præsumuntur rite esse acta*," see *Woodhouse v. Balfour*, 13 P. D. 2, and *post*, p. 91.

(r) In the following cases there was held to be a sufficient acknowledgment : *Gaze v. Gaze*, 3 Curt. 451. *Blake v. Knight*, *ib.*, 547. *Keigwin v. Keigwin*, *ib.*, 607. In the goods of *Davis*, *ib.*, 748. In the goods of *Ashmore*, *ib.*, 756. *Cooper v. Bockett*, 3 Curt. 649 ; 4 Moo. P. C. 419. In the goods of *Thomson*, 4 Not. of Cas. 643. *Leech v. Bates*, 6 Not. of Cas. 704. *Faulds v. Jackson*, 6 Not. of Cas. Supp. 1. *Burgoyne v. Showler*, 1 Rob. 12. *Bosanquet v. Bosanquet*, 2 Rob. 377. *Lloyd v. Roberts*, 12 Moo. P. C. 158. *Gwillim v. Gwillim*, 3 Sw. & Tr. 200. *Vinnicombe v. Butler*, 3 Sw. & Tr. 580. *Beckett v. Howe*, L. R. 2 P. & D. 1. *Inglesant v. Inglesant*, L. R. 3 P. & D. 172.

Daintree v. Fasulo, 13 P. D. 67, 102. It is not necessary that a testator should state to the witnesses that it is his signature : the production of a Will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the statute : *Ilott v. Genge*, 3 Curt. 172, 175, *per* Sir H. Jenner Fust. See also *Blake v. Knight*, *ibid.* 563, 564. In the goods of *Thomson*, 4 Notes of Cas. 643. *Leech v. Bates*, 6 Notes of Cas. 704, by Sir H. Jenner Fust. The like was held where the testator had intimated to the same effect by *gestures* : In the goods of *Davies*, 2 Rob. 337. The request of another person in the presence of the testator may be equivalent to a request by the testator himself. *Faulds v. Jackson*, 6 Notes of Cas. Suppl. 1. *Re Jones*, Dea. & Sw. 3. *Inglesant v. Inglesant*, L. R. 3 P. & D. 172.

(s) In the following cases there was held to be no sufficient acknowledgment : *Ilott v. Genge*, 3 Curt. 160 (affirmed in Privy Council, 4 Moo. P. C. 265). *Hudson v. Parker*, 1 Rob. 14. In the goods of *Summers*, 2 Rob. 295. *Croft v. Croft*, 4 Sw. & Tr. 10. In

before the signatures were put there : And on that ground, the learned judge, after consideration, refused to admit the paper to probate (*t*).

It may here be observed, that the Wills Act further enacts, by sect. 13, "that every will executed in manner hereinbefore mentioned shall be valid without any other publication thereof." And it has been said (*u*), that the result of this enactment is, that the testator need not inform the witnesses of the nature of the instrument they are attesting, and that even if he deceives them and leads them to believe that it is a deed, and not a Will, the execution is good notwithstanding.

the attestation must be *after* the testator has signed or acknowledged his signature to both the

Again, in the construction of the Statute of Frauds, it was held that the Act did not require that the witnesses should subscribe in the presence of each other, but that they might attest the execution separately, at different times (*v*). But

the goods of Swinford, L. R. 1 P. & D. 630. *Pearson v. Pearson*, L. R. 2 P. & D. 451. *Morritt v. Douglas*, L. R. 3 P. & D. 1. *Fischer v. Popham*, L. R. 3 P. & D. 246. *Blake v. Blake*, 7 P. D. 102. It is not sufficient merely to produce the paper to the witnesses where it does not appear that the signature of the testator was affixed to it at the time. *Hott v. Genge*, 3 Curt. 160, 181, per Sir H. Jenner Fust. In the goods of Ashton, 5 Not. of Cas. 548.

(*t*) In the goods of Hammond, 3 Sw. & Tr. 90. It will be seen from the cases cited above that evidence is admissible as to whether the signature of the testator was on the Will at the time of attestation. But sometimes it happens that no direct evidence is forthcoming. In such cases the Court is at liberty to judge from the circumstances of the case whether it was probable that the name of the testator was on the

Will at the time of attestation. In the goods of Huckvale, L. R. 1 P. & D. 375. In the goods of Pearn, 1 P. D. 70. The fact that there is an attestation clause in the proper form would seem itself to be some evidence that the name of the testator was on the Will at the time of attestation. In the goods of Huckvale (*ubi sup.*). In the goods of Pearn (*ubi sup.*). *Wright v. Rogers*, L. R. 1 P. & D. 678. *Woodhouse v. Balfour*, 13 P. D. 2. See further on this point, *Smith v. Smith*, L. R. 1 P. & D. 143. But the existence of an attestation clause is not conclusive. In the goods of Swinford, L. R. 1 P. & D. 630. *Croft v. Croft*, 4 Sw. & Tr. 10. *Fischer v. Popham*, L. R. 3 P. & D. 246.

(*u*) *Sugden's Essay*, p. 140, citing *Trimmer v. Jackson*, 4 Burn, E. L. 130. *British Museum v. White*, 3 Moo. & P. 689.

(*v*) *Ellis v. Smith*, 1 Ves. Jun. 12.

the Wills Act requires that the signature of the testator must attest in the presence of the witnesses (*x*). And if the Act is not complied with, the will is not valid. And it has been made or acknowledged in the presence of the witnesses, and has subscribed by the testator, this is not sufficient, unless the testator then expressly attests the execution of the will, or previously made the will, or acknowledged his signature, or may acknowledge his signature. King (*z*), a testator, a witness (his sister) said: On a subsequent day, when the witnesses were present, he requested the other witnesses to sign the will, saying in the presence of the witnesses, "This is my signature, as you see."

(*z*) *Cooper v. Bockett*, 638, per Sir H. Jenner Fust. *Faulds v. Jackson*, 6 Suppl. 1. In the goods of Dea & Sw. 1. In *Fulton*, 5 Moo. P. C. 419. The same Court held (with reference to their previous decision) that the witnesses must be in the presence of each other at the time of attestation, though the testator has not been shown to be present. (*y*) *Moore v. King*, 638, per Sir H. Jenner Fust. *Cooper v. Bockett*, *ibid.* P. C. 419. See also

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the Wills Act makes it necessary that both the witnesses to the Will shall be present, at the same time, when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, *though not of each other* (x). And it appears to be now fully established that the Act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made or acknowledged to them when *both* are actually present at the same time (y). And if one of the witnesses has subscribed *before* the testator signs or acknowledges his signature in the presence of both, and the other witness alone then subscribes in the presence of the former witness and the testator, this is not sufficient even though the former witness then expressly acknowledges the signature which he has previously made: For the Act says that the testator may *acknowledge* his signature; but does not say that the witnesses may *acknowledge* their subscriptions. Thus, in *Moore v. King* (z), a testator signed a codicil in the presence of a witness (his sister) who, at his desire, attested and subscribed it: On a subsequent day, when the sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and by my sister, as you see; you will oblige me, if you will add your

witnesses being present at the same time:

and they must attest in the presence of the testator, though not of each other:

(x) *Cooper v. Bockett*, 3 Curt. 659, per Sir H. Jenner Fust. *Faulds v. Jackson*, 6 Notes of Cas. Suppl. 1. In the goods of Webb, Dea. & Sw. 1. In *Casement v. Fulton*, 5 Moo. P. C. C. 130, the same Court held (without advert- ing to their previous decision) that the witnesses must attest *in the presence of each other*. This case, however, has not been followed.

(y) *Moore v. King*, 3 Curt. 243. *Cooper v. Bockett*, *ibid.* 648. 4 Moo. P. C. 419. See also In the goods

of *Allen*, 2 Curt. 331. In the goods of *Olding*, 2 Curt. 865. In the goods of *Simmonds*, 3 Curt. 79. In the goods of *Byrd*, 3 Curt. 117. *Pennant v. Kingscote*, 3 Curt. 643, 647. *Hindmarsh v. Charlton*, 8 H. of L. 160. The words of the Act are prospective, such witnesses "*shall attest and shall subscribe the Will in the presence of the testator*:" 3 Curt. 660, per Sir H. Jenner Fust.

(z) 3 Curt. 243.

signature, two witnesses being necessary:" That party then subscribed in the presence of the testator and his sister, the latter who was standing by him, pointing to her signature and saying, "There is my signature, you had better place yours underneath:" She did not, however, re-subscribe: And it was held by Sir H. Jenner Fust, that the instrument was not sufficiently attested under the new statute.

what is to be considered as the presence of the testator:

It will be observed that the provision of the Statute of Frauds, requiring that the witnesses shall attest and subscribe in the presence of the testator, is continued in the statute of Victoria, and as the language in both the Acts is the same in this respect, it should seem that the decisions which have taken place as to the former will govern the construction of the latter. The result of them is, that it is not requisite that the testator should actually see the witnesses sign, but that it is sufficient if he might have seen them if he chose to look (a). Thus where a Will was executed by the testatrix in her carriage and the witnesses subscribed in the attorney's office, opposite to the window of which the carriage was, so that she might have seen them through the window while subscribing, it was held that the statute was satisfied (b). But where the witnesses signed in an adjoining room to that in which the testator was, and the door between them was open, but he was not in such position that he could see them, it was held that the attestation was ill (c). In a case in the Prerogative Court (d), where the question arose on a Will made after the Wills Act came into operation, the witnesses had attested in the room where testator was lying in bed with the bed-curtains closed around him, so that he could not, for that

(a) *Shires v. Glascock*, 2 Salk. 688. *Day v. Smith*, 3 Salk. 395. *Todd v. Winchelsea, M. & Malk.* 12.

(b) *Casson v. Dade*, 1 Bro. C. C. 99.

(c) *Doe v. Manifold*, 1 M. & S. 249. *Winchelsea v. Wauchope*, 3

Russ. 441. Held, *Accord.* since the Wills Act, in the goods of *Newman*, 1 Curt. 914. In the goods of *Ellis*, 2 Curt. 395. In the goods of *Colman*, 3 Curt. 118. *Jenner v. Finch*, 5 P. D. 106.

(d) *Newton v. Clarke*, 2 Curt. 320.

reason, have seen Sir H. Jenner Fust executed by the decedent, who attest at the time, they do though he may accordingly admit case in the same curtain closed, and they subscribed, and visibility have seen been closed, by weakness, to have in which she could that the statute was the case from the seen but that the judge added that it no difference, in Will down-stairs. subscription of the from that in which been in a position as they subscribed. Though the testator he could have seen eight (g).

The Wills Act shall be necessary

(e) *Tribe v. Tribe*, Cas. 132. S. C. 1 Rol.

(f) *Norton v. Bassett*, 239. In the goods of *Jurist*, N. S. 248, 249.

Wilde laid it down that the test is, whether the testator has seen, not whether the witnesses sign the

reason, have seen the witnesses while they were subscribing; Sir H. Jenner Fust was of opinion that where a paper is executed by the deceased in the same room where the witnesses are, who attest it in the same room where the testator was at the time, they do attest it in the presence of the testator, though he may not actually see them sign: The Will was accordingly admitted to probate. But in a subsequent case in the same Court (*e*), where the testatrix lay with the curtain closed, and her back to the attesting witnesses when they subscribed, and it appeared that she could not by possibility have seen them do so, even if the curtains had not been closed, by reason of her inability, from her state of weakness, to have turned herself in her bed into a position in which she could have seen them sign, the same judge held that the statute was not complied with, and he distinguished the case from the former one where the testator could have seen but that the curtains were closed; And the learned judge added that in the present case there would have been no difference, in principle, if the witnesses had signed the Will down-stairs. Sir John Dodson held that where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (*f*).

Though the testator was blind, yet it must be shown that he could have seen the witnesses sign, had he had his eyesight (*g*).

The Wills Act provides (*gg*) that "no form of attestation shall be necessary." It is, therefore, sufficient if the wit-

no form of
attestation
necessary:

(*e*) *Tribe v. Tribe*, 7 Notes of Cas. 132. S. C. 1 Robert. 775.

(*f*) *Norton v. Basset*, Dea. & Sw. 239. In the goods of Trimmel, 11 Jurist, N. S. 248, 249, Sir J. P. Wilde laid it down that the true test is, whether the testator might have seen, not whether he did see the witnesses sign their names.

The testator must, it would seem, be conscious of the presence of the attesting witnesses: *Right v. Price*, Doug. 241. In the goods of Kellick, 3 Sw. & Tr. 578; *Jenner v. Finch*, 5 P. D. 106.

(*g*) In the goods of Piercy, 1 Robert. 278.

(*gg*) Section 9.

nesses, without any attestation clause of any description, merely subscribe their names (h). But it must be observed, that unless there is an attestation clause, reciting that the formalities prescribed by the Act have been complied with, the executor cannot obtain probate in the usual way on his own oath alone; but must produce an affidavit from one of the attesting witnesses, or some other satisfactory evidence showing that the solemnities have been performed as required by the statute (i).

the witnesses
may subscribe
by mark :

or with a
guided hand :

The decisions (k) on the construction of the Statute of Frauds appear to make it clear that in the case of the witnesses, as well as of the testator (l), a subscription by mark is sufficient, notwithstanding the witness be able to write. And these decisions have been followed, in the Ecclesiastical Court, in the construction of the Wills Act (m). So where a Will was attested by one witness in his own handwriting, and he also held and guided the hand of a second witness, who could not write or read, and in this way the second witness's name was written as attesting witness, the testator having desired the two to attest, this was held a sufficient attestation under the Will

(h) *Bryan v. White*, 2 Robert. 315. An attestation clause forms no part of a [Will or] codicil even when written by the testator, and, therefore, a recital by mistake in an attestation clause to a codicil that a former codicil was cancelled does not revoke that codicil : In the goods of Atkinson, 5 P. D. 165.

(i) See *post*, Pt. I. Bk. IV. Ch. II. § III. : and see the Rules of 1862 & 1871 (non-contentious), Nos. 4, 5, 6 and 7.

(k) *Harrison v. Harrison*, 8 Ves. 185. *Addy v. Grix*, *ibid.*, 504.

(l) See *Baker v. Denning*, 8 A. & E. 94, *ante*, p. 64.

(m) In the goods of Ashmore, 3 Curt. 756. In the goods of Amias, 2 Robert. 116. S. C. 7 Notes of

Cas. 274. See also *Hindmarsh v. Charlton*, 5 H. of L. 160. The initials of the witnesses may constitute a sufficient subscription and attestation, if made by them for their signatures as attesting the execution : In the goods of Christian, 2 Robert. 110. So also the initials of a testator and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid under Section 21 of the Wills Act ; In the goods of Blewitt, 5 P. D. 116 ; though the initials of the witnesses in the margin, if merely placed to attest the alteration, will not serve as an attestation to the will itself : In the goods of Martin, 1 Robert. 712.

Act (n). But a statute (o).

It has been held, that a witness, an acknowledged signature to the Act (p). According to the re-execution over his previous signature. It was held that the acknowledgment of the sufficient compliance with the witness to subscribe by the decision of a valid subscription in the name of the witness (q). It was further

(n) *Harrison v. Harrison*, 8 Ves. 117. In the goods of *Addy v. Grix*, 504. & Tr. 153. *Lewis v. Lewis*, 5 Tr. 153. But the testator cannot subscribe for the goods of White, 2 Robert. 110. In the goods of *Atkinson*, 5 P. D. 80. The testator should sign another should sign cannot be construed as a subscription by that witness, though he cannot write, might make his mark in the goods of Cope, 2 Robert. 116. In a case where the testator and witnesses, who were present, held the top of the will, the testator (the donor) wrote their names, but rejected the mark, and observed, that the person's hand is guided by his own, 'at that time' the person signed the name of the witnesses : In the goods of *Atkinson*, 5 P. D. 165. Notes of Cas. 15.

Act (n). But an attestation by *sealing* will not satisfy the statute (o). but not by seal :

It has been decided several times that, in the case of a witness, an acknowledgment by him of his previously subscribed signature is not a sufficient compliance with this Act (p). acknowledgment of signature not sufficient :

Accordingly where an attesting witness to a Will, on the re-execution thereof by the testator, merely traced over his previous signature with a dry pen, Sir H. Jenner *Fust* held that this amounted to no more than to an acknowledgment of the signature, which had been held not to be a sufficient compliance with the statute, inasmuch as it requires the witness to *subscribe* the Will (q). And it is now settled by the decision of the House of Lords (r), that to make a valid subscription and attestation there must be either the name of the witness, or some mark intended to represent it (s). It was further held in that case that a correction of there must be either the name of the witness or a mark intended to represent it :

(n) *Harrison v. Elvin*, 3 Q. B. 117. In the goods of Frith, 1 Sw. & Tr. 153. *Lewis v. Lewis*, 2 Sw. & Tr. 153. But the one witness cannot subscribe for the other : In the goods of White, 2 Notes of Cas. 461. In the goods of Leverington, 11 P. D. 80. The desire that another should sign for a witness cannot be construed to be a subscription by that witness, even though he cannot write ; for he might make his mark : In the goods of Cope, 2 Robert. 335. So in a case where the two attesting witnesses, who were able to write, held the top of the pen, whilst another person (the drawer of the Will) wrote their names, Sir H. J. *Fust* rejected the motion for Probate, and observed, that where a person's hand is guided, the act is his own, 'ut that here another person signed the names of the witnesses : In the goods of Kilcher, Notes of Cas. 15.

(o) In the goods of Byrd, 3 Curt. 117.

(p) *Moore v. King*, 3 Curt. 253.

(q) *Playne v. Scriven*, 1 Robert. 772 : In the goods of Maddock. L. R. 3 P. & D. 169. Where the deceased executed his Will in the presence of two witnesses, one of whom also made his mark in attestation of the signature of the deceased, and the second witness then wrote the names of the deceased and the witness opposite their respective marks, and also the word "witness," but did not subscribe his own name, the Court held that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid : In the goods of Eynon, L. R. 3 P. & D. 92.

(r) *Hindmarsh v. Charlton*, 8 H. of L. 160, affirming the decision of Sir C. Cresswell, 1 Sw. & Tr. 433.

(s) A witness need not sign his own name if the name actually

an error in the previous writing of his name, or his acknowledgment of it, or the adding a date to it, will not be sufficient for this purpose (t).

in what part of
the Will they
must sub-
scribe :

The Act, though it requires that the testator shall sign the Will at the foot or end of it, is silent as to the part of the instrument where the witnesses shall subscribe. It was said by Dolben, J., in *Lea v. Libb* (u), with reference to the Statute of Frauds, that if a Will is written on different sheets of paper, and each of the three witnesses subscribe on a different sheet, it is a good subscription within that statute. If this be good law, it should seem to be equally applicable to the Statute of Victoria. And it has been held, accordingly, in several cases in the Ecclesiastical Court that it matters not, under that statute, in what part of the Will the attesting witnesses sign their names; provided it appears that the signatures were meant to attest the requisite signature of the testator (x). The same question was decided, after full consideration, by the Court of Queen's Bench, in the case of

subscribed be intended to represent his name: *Re Oliver*, 2 Eccl. & Adm. 57. But a Will signed by the deceased in the presence of two persons, one of whom subscribed it with his own name, and the other with the name of her husband was refused probate: In the goods of *Leverington*, 11 P. D. 80. The signing of a Christian name if not intended as a perfect signature is not sufficient: In the goods of *Maddock*, L. R. 3 P. & D. 169. But where the witness subscribed "Servant to Mrs. Sperling," but without any name; this was held a sufficient attestation: In the goods of *Sperling*, 3 Sw. & Tr. 272. See further as to what is a sufficient attestation, *Griffiths v. Griffiths*, L. R. 2 P. & D. 300.

(t) And in a case where an attesting witness to a Will which had once been duly executed,

attested a second execution of the same Will by no other act than by writing the word "Bristol" (the name of the city), at the end of her name and the name of the street in which she dwelt (which she had written when she attested the former execution), it was held by Sir H. Jenner Fust that the latter attestation was insufficient: In the goods of *Trevanion*, 2 Rob. 311.

(u) Carth. 37.

(x) In the goods of *Davis*, 4 Curt. 748. In the goods of *Chamney*, 1 Robert. 757. But where there were two testamentary instruments, it was held not sufficient for the witnesses to subscribe their names at the end of the first of them alone, notwithstanding they were both written on the same sheet of paper: In the goods of *Taylor*, 2 Robert. 411. And where

Roberts v. Phillip
Frauds, which required
and subscribed "I
tended, that the p
is written under a
concluding words
and so preventing
But the Court h
will be understood
without any refere
name is to be wr
Will being subscri
where the witness
immediately signe
request with the
plainly applicable t
in the Wills Act.

No provision is c
several sheets. A
decisions on the con
to be authorities: A
written on several o
be attested, the w
whole be in the roo
seen by the witness
whether all the p
room; and further
ative (z). But when

an intended Will was
duplicate, one copy of
signed only by the testa
other only by the at
nesses, it was held t
paper was entitled to p
the goods of *Hatton*, 6
(y) 4 E. & B. 450.
was allowed in the ca
goods of *Streatley* [18

Roberts v. Phillips (y), upon the language of the Statute of Frauds, which requires that a Will of lands shall be "attested and subscribed" by the witnesses: It was thereupon contended, that the primary meaning of the word "subscribed" is *written under* and that it must here mean *written under the concluding words of the Will*, and signature of the testator, and so preventing any spurious additions after the execution: But the Court held that the word "subscribed" might well be understood as merely denoting a signing of the name without any reference to the part of the paper on which the name is to be written; and that the requisition as to the Will being subscribed by the witnesses was complied with, where the witnesses, who saw it executed by the testator, immediately signed their names on any part of it at his request with the intention of attesting it.—This decision is plainly applicable to the construction of the word "subscribe" in the Wills Act.

No provision is contained in the Act as to Wills written on several sheets. And, therefore, in this respect also, the decisions on the construction of the Statute of Frauds appear to be authorities: And, they have established that if a Will be written on several or even separate sheets, and the last alone be attested, the whole Will is well executed, provided the whole be in the room, and although a part may not have been seen by the witnesses; and that it is a question for a jury whether all the papers constituting the Will were in the room; and further, that the presumption is in the affirmative (z). But where a Will was signed by the testator and

attestation of
a Will written
on several
sheets:

an intended Will was written in duplicate, one copy of which was signed only by the testator, and the other only by the attesting witnesses, it was held that neither paper was entitled to probate: In the goods of Hatton, 6 P. D. 204. (y) 4 E. & B. 450. This case was followed in the case of In the goods of Streatley [1891] P. 172,

where the attesting witnesses to a will signed their names in the margin of the first and second sheets opposite to certain amendments.

(z) *Bond v. Seawell*, 3 Burr. 1773. *Gregory v. The Queen's Proctor*, 4 Notes of Crs. 620, 639. *Marsh v. Marsh*, 1 Sw. & Tr. 528. In cases where the attestation is not on the

also by two witnesses in the margin of the first four sheets, but in the fifth and last sheet the signature of the testator alone appeared, probate of the Will was refused, the Court (Sir J. Dodson) being of opinion that the signatures on the earlier sheets were intended merely to guard against other sheets being interpolated, and there being nothing to show that the signatures in the margin were intended to attest that signature of the testator which alone would give effect to the paper as a Will (a).

in what cases
unattested
papers referred
to by a Will or
codicil duly
executed be-
come a part
of it.

Again, the authorities with respect to the Statute of Frauds appear to apply to the Wills Act, upon the question, whether an unattested Will or other paper may be rendered valid as a testamentary disposition, by being referred to and adopted by a Will or codicil properly attested. Those authorities have established, that if the testator, in a Will or codicil or other testamentary paper duly executed, refers to an existing unattested Will or other paper, the instrument so referred to becomes part of the Will (b). But the reference must be

same sheet of paper as the signature of the testator the attestation must be on a paper physically connected with that sheet: In the goods of Braddock, 1 P. D. 433. At all events this must be so where the paper, which has not on it the attestation, is a codicil or other testamentary document complete in itself: In the goods of Pearse, L. R. 1 P. & D. 382; In the goods of Hatton, 6 P. D. 204.

(a) *Ewen v. Franklin*, Dea. & Sw. 7. See *Accord*, *Phipps v. Hale*, L. R. 3 P. & D. 166.

(b) *Habergam v. Vincent*, 2 Ves. 228. *Utterton v. Robins*, 1 A. & E. 423. *Doe v. Evans*, 1 Cr. & M. 42. The intention to incorporate must be clear and the document, it would seem, should be of a testamentary character: In the goods of Hubbard, L. R. 1 P. & D. 53, but

comp. *Bizzev v. Flight* (*ubi infra*). Where a Will (dated in 1841) revoking all former Wills referred to a clause in a former Will, Sir H. Jenner Fust refused to grant probate of so much of the former Will as was necessary to explain the latter Will: In the goods of Sinclair, 3 Curt. 746. However, where a Will expressly annulling all former Wills nevertheless referred to a prior Will put up in the same box with the present, "that in so far as any of the provisions therein contained may be applicable to existing circumstances at the time of my death, they may be carried into effect, and I recommend them accordingly with this view to the consideration of my executors," the same learned judge held that probate must be taken of the two

distinct, so as, necessary and part of mistake (c); written (d). *Accord*

papers as together Will: In the goods of Notes of Cas. 214. the goods of Bang 429. The principle as to incorporating, Wills of personality, referred to but not *per se* test fully discussed and the judgment of Dr. in *Sheldon v. Sheldon*, 81; *Bizzev v. Flight*. In the goods of Ho P. & M. 26. In the incorporated document to be included in the practice the Court do insist on this, notal paper referred to is in another party who with it, and the power to order its probate of the goods of Batter 439; In the goods of R. 1 P. & D. 106; document is bulky: of *Lansdowne*, 3 S. In the goods of Du P. & M. 165; nor do including the whole only is material: In *Limerick*, 2 Rob. 31. In the goods of How P. & M. 26; In the goods of 1 P. D. 150.

(c) Where a Will paper, such paper incorporated with the be clearly identifiable

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distinct, so as, with the assistance of parol evidence when necessary and properly admissible, to exclude the possibility of mistake (c); and the paper referred to must be already written (d). Accordingly, in *De Zichy Ferraris v. Lord*

papers as together containing the Will: In the goods of Duff, 4, Notes of Cas. 214. See also, In the goods of Bangham, 1 P. D. 499. The principles and practice, as to incorporating, in the probate of Wills of personalty, papers sufficiently referred to by such Wills but not *per se* testamentary, are fully discussed and explained in the judgment of Dr. Lushington, in *Sheldon v. Sheldon*, 1 Robert. 81; *Bizzev v. Flight*, 3 C. D. 269; In the goods of Howden, 43 L. J. P. & M. 26. In theory the incorporated document should always be included in the probate, but in practice the Court does not always insist on this, notably where the paper referred to is in the hands of another party who will not part with it, and the Court has no power to order its production: In the goods of Battersbee, 2 Rob. 439; In the goods of Sibthorp, L. R. 1 P. & D. 106; or where the document is bulky: In the goods of Lamdowne, 3 Sw. & Tr. 194; In the goods of Dundas, 32 L. J. P. & M. 163; nor does it insist on including the whole where part only is material: In the goods of Limerick, 2 Rob. 313. As to the incorporation of foreign Wills, see In the goods of Howden, 43 L. J. P. & M. 26; In the goods of Astor, 1 P. D. 150.

(c) Where a Will refers to a paper, such paper cannot be incorporated with the Will unless it be clearly identified with the

description of it given in the Will and be shown to have been in existence at the time the Will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the Will: *Singleton v. Tomlinson*, 3 App. C. s. 404; In the goods of Kehoe, 13 L. R. Ir. 13, Prob. The following are some of the principal cases on the sufficiency of the proof of identity: *Smart v. Prujean*, 6 Ves. 565; *Dillon v. Harris*, 4 Bligh, N. S. 321. In the goods of Smith, 2 Curt. 796. In the goods of Greaves, 1 Sw. & Tr. 250. In the goods of Almosnino, 1 Sw. & Tr. 508. In the goods of Drummond, 2 Sw. & Tr. 8. In the goods of Allnutt, 3 3 Sw. & Tr. 167. In the goods of Brewis, 3 Sw. & Tr. 473. *Dickinson v. Stidolph*, 11 C. B., N. S. 341. In the goods of Luke, 34 L. J., P. & M. 105. *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6. In the goods of Sunderland, L. R. 1 P. & D. 198. In the goods of Lady Truro, *ibid.* 201. In the goods of Watkins, L. R. 1 P. & D. 19. In the goods of Dallow, *ibid.* 189. In the goods of Gill, L. R. 2 P. & D. 6. In the goods of Mercer, L. R. 2 P. & D. 91. In the goods of Heathcote, 6 P. D. 30. In the goods of Daniell, 8 P. D. 14.

(d) The following are some of the cases as to the necessity of the in-

Hertford (e), where a testator by Will, duly executed, directed his executors to pay legacies which he should give by any testamentary writing signed by him, *whether witnessed or not*, it was held that such a clause could not give effect to legacies bequeathed by an unattested paper made after the Wills Act came into operation.—Again, in the same case, it appeared that the testator, before Jan. 1, 1838 (at which date the Wills Act came into operation) had made a Will and several codicils, some duly executed, others only signed by the testator: After Jan. 1, 1838, he made and signed a codicil (B), but the same was not duly attested: Afterwards, by a codicil (C), duly executed and attested, he ratified and confirmed his Will and “*codicils*.” And it was held that the unattested codicil (B) was not so identified with the duly attested codicil (C) as to be ratified by, or incorporated with it; the word “*codicils*” being more completely and properly applicable to the codicils which had been made before Jan. 1, 1838 (*f*). But in *Ingoldby v. Ingoldby (g)*, where a testator made a codicil to

incorporated paper being already in existence. *Wilkinson v. Adam*, 1 Ves. & B. 445. *Utterton v. Robins*, 1 A. & E. 423. In the goods of *Gill*, L. R. 2 P. & D. 6. *Singleton v. Tomlinson*, 3 App. Cas. 404. A testamentary paper duly executed in order to incorporate another must refer to it as a written instrument then existing in such terms that it may be ascertained. *Smart v. Prujean*, 6 Ves. 565. *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6. In the goods of *Sunderland*, L. R. 1 P. & D. 198. The republication of a Will by the execution of a codicil will not of itself entitle an unexecuted paper written or signed between the date of the Will and the date of the codicil to probate. But where the Will, if read as speaking at the date of the execution of the codicil, contains

language which would operate as an incorporation of the document to which it refers, such document although not in existence until after the execution of the Will is entitled to probate by force of the codicil. In the goods of *Truro*, L. R. 1 P. & D. 201. In the goods of *Stewart*, 3 Sw. & Tr. 192. In the goods of *Matthias*, 3 Sw. & Tr. 100.

(*e*) 3 Curt. 468. S. C., on appeal, 4 Moo. P. C. 339, *nomine Croker v. Lord Hertford*.

(*f*) See also *Accord. Haynes v. Hill*, 1 Robert. 795. In the goods of *Phelps*, 6 Notes of Cas. 695. In the goods of *Hakewell*, Dea. & Sw. 14. In the goods of *Matthias*, 3 Sw. & Tr. 100.

(*g*) 4 Notes of Cas. 493. Just as a codicil which republishes a former Will, may, if the words of reference are sufficiently clear,

his Will in 1840, his death dictating his Will, without executed instrument titled to probate delivering his judgment where there were executed; therefore which came under paper to which description.

The decision on points above mentioned existing law, to doctrine which in real estate under cannot by his Will to dispose of his

as a Will or codicil

The doctrines

incorporate not on a republished Will, but also not in existence at the execution of the republished Will, so a later testamentary instrument may entitle to probate a subsequently executed testamentary instrument, but this is, as appears from the text, merely an incorporation, and subject to the rules, see in the goods of *Phelps*, L. R. 1 P. & D. 201. of incorporation may be of testamentary writing on the duly executed instrument. In the goods of *Heath*, L. R. 1 P. & D. 30. In the goods of *Phelps*, L. R. 1 P. & D. 201. In the goods of *Dallow*, L. R. 1 P. & D. 189, but this question would only arise

his Will in 1845, attested by one witness, and the day before his death dictated a paper (which was afterwards duly executed according to the Wills Act) as "another codicil to my Will," without more specifically referring to the defectively executed instrument; it was held that both codicils were entitled to probate: And Sir H. Jenner Fust distinguished, in delivering his judgment, this case from that of Lord Hertford, where there were codicils duly executed and codicils not duly executed; there being in the present case only one paper which came under the description of codicil, and no other paper to which the testator could have referred under that description.

The decision in *Lord Hertford's case* of the former of the points above mentioned appears to have applied, under the existing law, to testamentary dispositions of all kinds, the doctrine which had been already established as to devises of real estate under the Statute of Frauds, viz., that a testator cannot by his Will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a Will or codicil (*h*).

A Will cannot create a power of disposition by a future unattested paper.

The doctrines above stated as to the incorporation of unincorporate not only the republished Will, but also documents not in existence at the date of the execution of the republished Will, so a later testamentary paper may entitle to probate a prior imperfectly executed testamentary paper: but this is, as appears from the text, merely an instance of incorporation, and subject to the same rules, see *In the goods of Truro*, L. R. 1 P. & D. 201. The question of incorporation may arise in respect of testamentary writings appearing on the duly executed paper, see *In the goods of Heathcote*, 6 P. D. 30. *In the goods of Watkins*, L. R. 1 P. & D. 19. *In the goods of Dallow*, L. R. 1 P. & D. 189, but this question in such case would only arise if the Court

was of opinion that the writing was not parcel of the Will, so as either to be part of that which was duly executed by the signature at the foot or end thereof, or so part of it as to invalidate the execution as not complying with the Wills Act, see *ante*, p. 71, note (*d*). The fact that the codicil is on the same paper is not of itself sufficient to incorporate it. *In the goods of Brewis*, 3 Sw. & Tr. 473. *In the goods of Watkins*, L. R. 1 P. & D. 19; nor are the words "This is a fourth codicil to my Will," although the unexecuted codicil commenced "This is a third codicil": *Stockil v. Punshon*, 6 P. D. 9. See however, *In the goods of Heathcote*, 6 P. D. 32, per Hannen, P.

(*h*) *Johnson v. Ball*, 5 De G. &

Parol evidence
admissible to
identify the
reference.

Will referring
to two memo-
randums and
where one only
can be found.

Effect of the

attested papers with duly executed Wills and codicils were fully confirmed, and very many of the cases which are collected in the notes to the foregoing pages were cited and discussed by Lord Kingsdown in delivering the opinion of the Privy Council in the case of *Allen v. Maddock* (i), and his Lordship proceeded to state the law as follows: "The result of the authorities, both before and since the late Act, appears to be, that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified" (k).

Where a Will referred to two memorandums and only one could be found, it was held that effect must be given to that which was found,—for either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming (l).

In acting upon the doctrines established by the authorities

Sm. 85, 91. See also *Briggs v. Penny*, 3 De G. & S. 525. *Re Boyes*, 26 C. D. 531.

(i) 11 Moore, P. C. 427, 461. See also S. C., *coram* Sir J. Dodson, Dea. & Sw. 325.

(k) But the reference in a Will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular: but the authorities seem clearly to esta-

lish that where there is a reference to any written document described as *then existing* in such terms, that it is capable of being ascertained, parol evidence is admissible to ascertain it. *Allen v. Maddock*, 11 Moore, P. C., at p. 454. In the goods of Dallow, L. R. 1 P. & D. 189. In the goods of Sunderland, L. R. 1 P. & D. 198. In the goods of Kehoe, 13 L. R. Ir. 13.

(l) *Dickinson v. Stidolph*, 11 C. B., N. S. 341.

which there has no little difficulty given by the attending the a have been exam happen) at a per be that they have they are quite u according to the the other negat with the statute appears to be, of a Will, he m not absolutely u have their posit actually signed before they su face of it appear "omnia esse rite attestation claus ular, e.g., that t both witnesses (

(m) *Blake v. Kn* 547. *Gregory v. The* tor, 4 Notes of Cas. son v. Hall, 2 Rob further as to this p r. Gwillim, 3 Sw Beckett v. Howe, L As to the meaning of these cases see, h r. Blake, 7 P. D. 10 Sanderson, 9 P. D. p. 76.

(n) *Wright v. San* 149. *Lloyd v. Rol* P. C. 158. *Burgoy* 1 Rob. 5. *Smith* R. 1 P. & D. 143. 9 Q. B. 648. *Lee* Rob. 714. The applies even where

which there has been occasion to cite in the foregoing pages, no little difficulty has occurred with respect to the evidence given by the subscribed witnesses of the circumstances attending the attestation, particularly where the witnesses have been examined for the first time (as must very often happen) at a period long after the transaction. For it may be that they have no recollection at all on the subject, so that they are quite unable to affirm that the Will was executed according to the Statute: Or it may be that one affirms and the other negatives, or that both negative, a compliance with the statute.—The result of the cases on this subject appears to be, that although, if a party be put to proof of a Will, he must examine the attesting witnesses, it is not absolutely necessary, for the validity of the Will, to have their positive affirmative testimony that the Will was actually signed or actually acknowledged in their presence before they subscribed (*m*). For if the Will on the face of it appears to be duly executed, the presumption is "*omnia esse rite acta*;" even though there should be an attestation clause, omitting to state some essential particular, *e.g.*, that the Will was signed in the joint presence of both witnesses (*n*). So in a case where an affidavit was

evidence of the attesting witnesses as to the circumstances of the attestation.

Not necessary to have positive affirmative evidence of execution.

Presumption.

(*m*) *Blake v. Knight*, 3 Curt. 547. *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620. *Thomson v. Hall*, 2 Robert. 426. See further as to this point, *Gwillim v. Gwillim*, 3 Sw. & Tr. 200. *Beckett v. Howe*, L. R. 2 P. & D. 1. As to the meaning and authority of these cases see, however, *Blake v. Blake*, 7 P. D. 102. *Wright v. Sanderson*, 9 P. D. 149 and *ante*, p. 76.

(*n*) *Wright v. Sanderson*, 9 P. D. 149. *Lloyd v. Roberts*, 12 Moo. P. C. 158. *Burgoyne v. Showler*, 1 Rob. 5. *Smith v. Smith*, L. R. 1 P. & D. 143. *Doe v. Davies*, 9 Q. B. 648. *Leech v. Bates*, 1 Rob. 714. The presumption applies even where the attestation

clause is incomplete. *Vinnicombe v. Butler*, 3 Sw. & Tr. 580. In the goods of *Rees*, 34 L. J., P. & M. 56. The maxim *omnia presumuntur rite esse acta* is an expression in a short form of a reasonable probability and of the propriety in point of law of acting on such probability. Thus, in the case of a lost Will, where it was proved that a document purporting to be the Will of the deceased was signed by him, that two names of deceased friends of his were written underneath, that one of the names was a genuine signature, and there was no evidence about the other name, the Court drew the inference that the signature as to which there was no evidence was a genuine

Where attest-
ing witnesses
contradict
each other.

required from the attesting witnesses (there being no attestation clause) as to the due execution of the Will under the statute, and one of them deposed that he saw the deceased sign, in the presence of himself and the other witness, but the latter could not recollect whether the deceased signed her name in his presence or not, probate was allowed to pass on motion (*o*). Again, it has been held, that where the attesting witnesses depose contrary to each other, (as where one swears that they attested the Will in the presence of the testator, and the other that it was attested in another room; or where one of three attesting witnesses swears that the testator signed in their presence, and the two others swear that he did not), the Court is not thereupon bound to pronounce against the validity of the Will; but may either examine other witnesses (who were present at the execution though they did not subscribe the Will) in order to arrive at the truth (*p*), or may, upon the mere circumstances, give credence to the affirmative rather than to the negative testimony (*q*). And even where both the attesting witnesses profess to remember the transaction, and state facts which show that the Will was not duly executed, (as that the testator did not make or acknowledge his signature in their joint presence, or the like), not only may this negative evidence be rebutted by the testimony of other witnesses, or by the proof of circumstances showing that the attesting witnesses are not to be credited (*r*); but in this case also the Court may justly come to a conclusion from the facts and circumstances which the attesting witnesses themselves state,

Where attest-
ing witnesses
state facts
showing that
will was not
duly executed.

signature, and that all was done properly, although there was no attestation clause to say so. *Harris v. Knight*, 15 P. D. 170. For a case where the Court refused to make such presumption, see: *In the goods of Swinford*, L. R. 1 P. & D. 630.

(*o*) In the goods of *Hare*, 3 Curt. 45. In the goods of *Attridge*, 6 Notes of Cas. 597. *Daintree v. Fasulo*, 13 P. D. 67.

(*p*) *Young v. Richards*, 2 Curt. 371.

(*q*) *Chambers v. The Queen's Proctor*, 2 Curt. 433. *Gove v. Gawen*, 3 Curt. 151. *Wright v. Rogers*, L. R. 1 P. & D. 678.

(*r*) See *Accord*. *Austen v. Willes*, Bull. N. P. 264. *Pike v. Badmering*, cited 2 Stra. 1096, in *Rice v. Oatfield*, post, Pt. I. Bk. IV. Ch. III. § v.

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in *Cooper v.*
Fust, upon t
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testimony) whi
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duly attested (*x*)

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it for the purpo

"There is no
Lord Hardwick
estate, accordin

(*o*) *Cooper v. I.*
663. See also *B*
Notes of Cas. 22.

4 Notes of Cas. 64

(*l*) 3 Curt. 648.

(*u*) 4 Moo. P. C.

(*z*) *Pennant v. K*

642. *Beach v. Cl*

Cas. 120. *Croft*

P. M. & A. 44.

that their memory fails them; and so the Will may be admitted to probate, notwithstanding their testimony (s). Thus, in *Cooper v. Bockett* (t), a Will was held by Sir H. Jenner Fust, upon the circumstances of the case, to have been signed before the witnesses subscribed, although one witness deposed that the testator signed *after* he and his fellow witness had subscribed, and the other witness deposed that the part of the Will where the signature of the testator was written was blank when she, the witness, subscribed: And this decision was affirmed in the Privy Council (u). Where, however, the attesting witnesses state facts (not contradicted by other testimony) which demonstrate that the Will was not duly executed, and there are no circumstances on which the Court can found an inference that the recollection of the witnesses is infirm on the subject, the Will must be pronounced against, notwithstanding it should be all in the handwriting of the deceased, and be signed by him and profess to be duly attested (x).

Finally, it must be borne in mind that a testamentary paper is not entitled to probate, unless the Court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature (y).

Court must be satisfied that witnesses' names were subscribed to will for purpose of attesting testator's signature.

SECTION III.

The Form of a Will.

"There is nothing that requires so little solemnity," said Lord Hardwicke (z), "as the making of a will of personal estate, according to the Ecclesiastical laws of this realm;

(s) *Cooper v. Bockett*, 3 Curt. 663. See also *Baylis v. Sayer*, 3 Notes of Cas. 22. *Shield v. Shield*, 4 Notes of Cas. 647.

(t) 3 Curt. 648.

(u) 4 Moo. P. C. 410.

(z) *Pennant v. Kingscote*, 3 Curt. 642. *Beach v. Clarke*, 7 Notes of Cas. 120. *Croft v. Croft*, 34 L. J. P. M. & A. 44. *Blake v. Blake*, 7

P. D. 102.

(y) In the goods of *Wilson*, L. R. 1 P. & D. 269. In the goods of *Braddock*, 1 P. D. 433. In the goods of *Sharman*, L. R. 1 P. & D. 661. *Griffiths v. Griffiths*, L. R. 2 P. & D. 300. In the goods of *Streatley* [1891] P. 172. And see *ante*, p. 86, note (a).

(z) In *Ross v. Ewer*, 3 Atk. 163.

Testamentary form not necessary : but it must be intention of deceased that paper shall operate after his death.

The supposed exercise of a power may operate as a mere Will.

Principles on which instruments not purporting to be testamentary may be admitted to probate :

for there is scarcely any paper writing which they will not admit as such." Although much greater strictness seems to have prevailed in earlier times, it has been decided in a great variety of modern instances, that it is not necessary that an instrument should be of a testamentary form, in order to operate as a Will : Indeed it may be considered as a settled point, that the *form* of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death (*a*), and the paper is duly attested in accordance with the Wills Act, 1 Vict. c. 26 (*b*).

[In the former editions of this work there were cited a large number of cases as to the effect, as wills, of deeds, bonds, and other documents not testamentary in form, but it has been thought advisable, having regard to the improbability of such documents complying with the requirements of the Wills Acts in respect of attestation and otherwise, and to the lapse of time since the passing of that Act, to omit these authorities from the present edition.]

So if a man intends by Will to execute and purports to execute a power, and it turns out that the power is not well created, or does not exist, yet if he has a right to dispose of the fund, the Will may operate, and ought to be admitted to probate ; for in a Will no particular words are necessary to pass the property, and his authority to give it shall come in aid of his intended disposition of it (*bb*).

And it must be further observed, that it is not necessary for the validity of a testamentary instrument, that the testator should intend to perform, or be aware that he had performed

(*a*) By Sir John Nicholl, in *Masterman v. Maberly*, 2 Hagg. 248. *Doe v. Cross*, 8 Q. B. 714. *Cock v. Cooke*, 1 L. R. P. & D. 241. *Robertson v. Smith*, L. R. 2 P. & D. 43. In the goods of *Coler*, 2 L. R. P. & D. 362.

(*b*) In the goods of *Colyer*, 14 P. D. 48, where a paper executed in the form of a deed, but bearing the attestation of two witnesses, was held entitled to probate. And in the case of *Milnes v. Foden*, 15 P.

D. 105, two deed polls were held entitled to probate. Thus in the goods of *Slinn*, 15 P. D. 156, probate was granted of a deed poll duly executed and attested by two witnesses but containing no reference to the death of the testatrix, and extrinsic evidence was admitted to shew that she intended it to operate as a Will.

(*bb*) *Southall v. Jones*, 1 Sw. & Tr. 298.

a testamentary contains a disposition though it were gift, or a bond Will or other testamentary instrument of a different shape nevertheless of the same character (*d*).

But no case has been cited in which an instrument not in the form of a Will operates as a Will. The authorities are to the effect that the paper itself, and not the intention of the testator, was the intention to give the benefits by the instrument considered as a Will was to give effect to.

(*c*) *Bartholomew v. Phillim*, 318.

(*d*) By Sir John Masterman *v. Maberly*, 2 Hagg. 247. In the goods of *Coler*, 2 L. R. P. & D. 214. In the instrument written by the deceased though not in a testamentary form. But a Will, though not executed as a Will, will operate as a Will, if there were no other evidence that it was intended to operate as a Will, or without any intention of operating as a Will. In *Masterman v. Maberly*, 2 Hagg. 247. *Smith v. Sw. & Tr. 298*. *Gusson-Davie v. Jones*, 15 P. D. 109. See also *the necessity of there being a testamentary intention*: *Shep. Touch. Pt. 1, s. 3, pl. 1*. *D'Egville*, 3 Hagg. 247. In the instrument, upon the face of which it manifestly executed.

a testamentary act (c); for it is settled law, that if the paper contains a disposition of the property to be made *after death*, though it were meant to operate as a settlement or a deed of gift, or a bond; though such paper were not intended to be a Will or other testamentary instrument, but an instrument of a different shape, yet if it cannot operate in the latter, it may nevertheless operate, if duly executed, in the former character (d).

But no case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a Will. The true principle to be deduced from the authorities appears to be, that, if there is proof, either in the paper itself, or from clear evidence *dehors* (e), first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a Will; secondly, that death was the event that was to give effect to it; then whatever may be its form, it

(c) *Bartholomew v. Henley*, 3 Phillim. 318.

(d) By Sir John Nicholl in *Masterman v. Maberly*, 2 Hagg. 247. In the goods of Morgan, L. R. 1 P. & D. 214. In these cases the instrument was intended by the deceased to be operative, though not in a testamentary way. But a Will, though formally executed as a Will, will not be valid if there were no *animus testandi*; and therefore it may be shown in evidence that it was written in jest, or without any intention of making an operative Will: *Nicholls v. Nicholls*, 2 Phillim. 180. *Lister v. Smith*, 3 Sw. & Tr. 252. *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109. See also, as to the necessity of there being an *animus testandi*: *Shep. Touch.* 404. *Swinb. Pt. 1, s. 3, pl. 23*. *Taylor v. D'Egville*, 3 Hagg. 206. But if an instrument, upon the face of it, is manifestly executed as a Will, the

Court of Probate cannot look at its effect; it must have legal operation, without regard to the intention as to effect: *King's Proctor v. Daines*, 3 Hagg. 231. *Philips v. Thornton*, 3 Hagg. 752.

(e) If the instrument be equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition: *King's Proctor v. Daines*, 3 Hagg. 221. *Jones v. Nicholay*, 2 Robert. 292, where Sir H. Jenner Fust said, "Evidence to show *quo intuitu* has always been received in a Court of Probate." In the goods of English, 3 Sw. & Tr. 586. *Cock v. Cooke*, L. R. 1 P. & D. 241. *Robertson v. Smith*, L. R. 2 P. & D. 43. In the goods of Slinn, 15 P. D. 156. See also *post*, Pt. I. Bk. IV. Ch. II. § v. for other cases as to the reception of parol evidence respecting the testator's intention.

may, assuming that there is execution in compliance with the Wills Act, be admitted to probate as testamentary (*f*). And there seems to be this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character; that the first will be entitled to probate, unless they are proved not to have been written *animo testandi*; whilst, in the latter, the *animus* must be proved by the party claiming under them (*g*).

It should be observed that if a document, although in the form of a will, bears upon its face the positive assertion by the person executing it that it is not meant to operate as a legal will, it will not be held to be a valid testamentary document (*h*).

If a testator by a subsequent paper say he has bequeathed by a former instrument that which he has not bequeathed, the subsequent paper would, it would seem, be admitted to probate, as being a declaration of his Will at the time he made it, to dispose by the Will (*i*).

But it is essentially requisite that the instrument should be made to *depend upon the event of death*, as necessary to

they must depend on the death of the maker for consummation.

(*f*) King's Proctor v. Daines, 3 Hagg. 221. Jones v. Nicholay, 2 Robert. 288. In the goods of Robinson, L. R. 1 P. & D. 384. Milnes v. Foden, 15 P. D. 105, 107. It would seem that it is not an objection to probate that it is asked in respect only of part of a document: Doe d. Cross v. Cross, 8 Q. B. 714. But see In the goods of Robinson, *ubi sup.*; from which case it would seem that no part of an instrument which is wholly irrevocable can be treated as testamentary. A duly executed paper in these terms, "I wish my sister to have my bank-book for her own use," was held to be testamentary, the Court being satisfied on the evidence that the deceased at the time of its execution intended

it to take effect after her death, and not as a present deed of gift. Cock v. Cooke, L. R. 1 P. & D. 241. In the goods of Coles, L. R. 2 P. & D. 362.

(*g*) King's Proctor v. Daines, 3 Hagg. 221. Griffin v. Fernard, 1 Curt. 199. Coventry v. Williams, 3 Curt. 790, 791. Thorncroft v. Lashmar, 2 Sw. & Tr. 479.

(*h*) Ferguson-Davie v. Ferguson-Davie, 15 P. D. 109.

(*i*) Druce v. Denison, 6 Ves. 367, in the judgment of Lord Eldon, C. Bibin v. Walker, Amb. 661. Godolph. Pt. 3, ch. 3, s. 3. Jordan v. Fortescue, 10 Beav. 259. Farrer v. St. Catharine's College, L. R. 16 Eq. 19. But see Frederick v. Hall, 1 Ves. 396.

consummate it; conferred *inter alia*, to the effect established as to The Court do to a single instrumentatures and form deceased (*l*).

The rules of respect to the law which it allows held necessary the property should be in direct and in been deemed sufficient.

(*l*) Glynn v. Oglan, 428. King's Proctor v. Hagg. 218. Shingleton, 4 Hagg. 359. In the goods of Robinson, L. R. 2 P. & D. 384.

(*m*) See post p. 13. Admission of probate of instruments of different kinds together containing the deceased. Where proved of two or more papers, as together contained the Will of the deceased, practice to make the executors named in the papers. In the goods of Harris, L. R. 1 P. & D. 323.

(*n*) Passmore v. Phillim, 218, in Sir W.E.—VOL. I.

consummate it; for where a paper directs a benefit to be conferred *inter vivos*, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary (*k*).

The Court does not confine the testamentary disposition to a single instrument: but will consider several, of different natures and forms, as constituting altogether the Will of the deceased (*l*).

Several instruments of different natures may constitute altogether a Will.

SECTION IV.

The Language of a Will.

The rules of the Court are not more scrupulous with respect to the language, than the nature, of instruments which it allows to operate as testamentary. It is not held necessary that the directions contained in them, how property should be disposed of in the event of death, should be in direct and imperative terms: wishes and requests have been deemed sufficient (*m*).

Language of a testamentary paper.

"Wishes" and "requests" deemed sufficient.

(*k*) *Glynn v. Oglander*, 2 Hagg. 428. *King's Proctor v. Daines*, 3 Hagg. 218. *Shingler v. Pember-ton*, 4 Hagg. 359. And see *In the goods of Robinson*, L. R. 1 P. & D. 384.

(*l*) See *post* p. 138, as to the admission of probate of two or more instruments of different date as together containing the Will of the deceased. Where probate is granted of two or more testamentary papers, as together containing the last Will of the deceased, it is the practice to make the grant to all the executors named in the several papers. *In the goods of Morgan*, L. R. 1 P. & D. 323. *In the goods of Harris*, L. R. 2 P. & D. 83.

(*m*) *Passmore v. Passmore*, 1 Phillim. 218, in *Sir J. Nicholl's*

judgment. Generally speaking when property is given absolutely to any person, and the same person is by the giver "recommended," or "entreated," or "requested," or "wished" to dispose of that property in favour of another, the recommendation, request, or wish, is held imperative and to create a trust. (See the cases cited, in *Knight v. Knight*, 3 Beav. 148, and *Knight v. Broughton*, 11 Cl. & Fin. 513.) But this rule does not apply, where it appears clearly from the context that the first taker is intended to have a discretionary power to withdraw any part of the fund from the object of the wish or request, or that he is in any way to have an option to control or defeat the desire ex-

Language of
Will immaterial.

It is immaterial in what language a Will is written, whether in Latin, French, or any other tongue (*n*). If the testator be a domiciled Englishman, the effect of the foreign tongue employed can only be looked at in order to ascertain what are the equivalent expressions in English (*o*).

SECTION V.

Of the Materials with which a Will may be Written, and of the Person who may be the Writer: and herewith of a Will prepared by a Legatee.

Pencil Will, or alterations in Will.

There are scarcely any restrictions in the Ecclesiastical Law, with respect to the materials on which, or by which, a testamentary document may be executed (*p*). Thus a Will or Codicil, or any part thereof, may be made or altered in pencil as well as in ink (*q*). But when the question was, as

pressed: *Eaton v. Watts*, L. R. 4 Eq. 151. *Lambe v. Eames*, L. R. 6 Ch. 597. *Stead v. Mellor*, 5 C. D. 225. *Re Hutchinson and Tenant*, 8 C. D. 540. *Parnall v. Parnall*, 9 C. D. 96. *Re Adams and Kensington Vestry*, 24 C. D. 199, 27 C. U. 394. *Mussoorie Bank v. Raynor*, 7 App. Cas. 321. For the older authorities on this subject, see former editions of this work. The older authorities went much further than the modern in holding that trusts were created by precatory words. And in the case of *Lambe v. Eames*, *ubi sup.*: Lord Justice James said "In hearing case after case cited, I cannot help feeling that the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed," and Lord Justice Cotton in *Re Adams and Kensington*

Vestry, *ubi sup.*: said, "I have no hesitation in saying myself that I think some of the older authorities went a great deal too far in holding that some particular words in a Will were sufficient to create a trust . . . Having regard to the late decisions, we must not extend the old cases in any way or rely on the mere use of any particular words, but considering all the words that are used we have to see what is their true effect, and what was the intention of the testator as expressed in his Will." See also *Re Diggles*, 39 C. D. 253.

(*n*) *Swinb.* Pt. 4, s. 25, pl. 3. See as to a Will in a foreign language, *Foubert v. Cresseron*, *Show. P. C.* 194.

(*o*) *Reynolds v. Kortright*, 18 *Beav.* 417.

(*p*) *Swinb.* Pt. 4, s. 25, pl. 2.

(*q*) *Rymes v. Clarkson*, 1 *Philim.* 36.

Ch. II. § v.]

before the Wills intended the pay testamentary, or formal dispositive became a most held that the go where alterations tive; where in in same presumptio occasionally does Act (*rr*).

By the civil favour, the instru not been adopted which only holds instrument or cor its dispositions, against the act, volition and capac of the contents of this realm determ though the person

(*r*) *Hawkes v. Hav*
322. *Parkin v. Bain*
321.

(*rr*) In the goods c
2 P. & D. 256. In
Adams, L. R. 2 P. &

(*s*) *Dig. lib.* 48, t.
lib. 34, s. 8.

(*t*) *Paske v. Olat*
324. *Ingram v. W*

301. But it must n
stood that the rule

vidence that the t
the contents is necess

stantial evidence may
for this purpose: *Ra*

Scott, 1 M. & K. 643.

before the Wills Act it often used to be, whether the testator intended the paper as a final declaration of his mind, and as testamentary, or whether it was merely preparatory to a more formal disposition, the material with which it was written became a most important circumstance. And it has been held that the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute (*r*). And the same presumption prevails when the question arises as it occasionally does in respect of Wills made since the Wills Act (*rr*).

Presumption that pencil alterations are deliberative and ink alterations are final.

By the civil law, if a person wrote a Will in his own favour, the instrument was rendered void (*s*). That rule has not been adopted in its fullest extent by the law of England, which only holds that where the person who prepares the instrument or conducts its execution, is himself benefited by its dispositions, this circumstance creates a presumption against the act, and renders necessary very clear proof of volition and capacity as well as of a knowledge by the testator of the contents of the instrument (*t*). Nor does the Law of this realm determine that the act is absolutely void, even though the person making the Will in his own favour is the

Where a Will is written or prepared by a party in his own favour:

when he is the agent and attorney of the testator.

(*r*) *Hawkes v. Hawkes*, 1 Hagg. 322. *Parkin v. Bainbridge*, 3 Phil. 321.

(*rr*) In the goods of *Hall*, L. R. 2 P. & D. 256. In the goods of *Adams*, L. R. 2 P. & D. 367.

(*s*) Dig. lib. 48, t. 10, s. 15, and lib. 34, s. 8.

(*t*) *Paske v. Ollat*, 2 Phillim. 324. *Ingram v. Wyatt*, 1 Hagg. 391.

But it must not be understood that the rule is that *direct* evidence that the testator knew the contents is necessary: circumstantial evidence may be sufficient for this purpose: *Raworth v. Marriott*, 1 M. & K. 643. And know-

ledge will, as in other cases *prima facie* be presumed on proof of capacity and execution: *Barry v. Butlin*, 2 Moo. P. C. 480. And even where there is affirmative evidence of knowledge by reason of the will having been read over to a testator, competent in mind, before execution, there is no unyielding rule of law (especially where the ingredient of fraud enters into the case) shutting out all further inquiry. *Fulton v. Andrew*, L. R. 7 H. L. 465, *per Cairns*, L. C. Undue influence, if suggested, must be supported by affirmative proof. *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

agent and attorney of the testator; but the suspicion is thereby, for obvious reasons, greatly increased (u).

Rule in *Barry v. Butlin*.

. *Onus probandi* on party propounding Will.

ii. The Court should be vigilant in cases where the party writing or preparing the Will takes a benefit thereunder.

This doctrine was fully considered by the Lords of the Judicial Committee of the Privy Council, in the case of *Barry v. Butlin* (x). And it should seem that the terms, in which the rule above stated has been laid down, require some qualification. In delivering the judgment of their Lordships in that case, Parke, B., made the following observations: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal, and have been acquiesced in on both sides. These rules are two; the first is, that the *onus probandi* lies upon the party propounding a Will, who must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator; the second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased. These principles, to the extent that I have stated, are well established: The former is undisputed; the latter is laid down by Sir John Nicholl, in substance, in *Paske v. Ollat*; *Ingram v. Wyatt*; and *Billinghurst v. Vickers*; and is stated by that very learned and experienced judge to have been

(u) *Ingram v. Wyatt*, 1 Hagg. 391. *Dufaur v. Croft*, 3 Moore, P. C. 136. *Parfitt v. Lawless*, L. R. 2 P. & D. 462. In some cases the conduct of a professional man who prepared a Will has been held fraudulent, and the Will inoperative, by reason of his allowing the testator to remain in ignorance, which influenced the Will in favour of himself. See *Segrave v. Kir-*

wan, 1 Beat. 157. *Hindson v. Wetherill*, 1 Sm. & G. 609. *De G., M. & G.* 301. *Walker v. Smith*, 29 Beav. 394. See also *Bulkeley v. Wilford*, 2 Cl. & F. 102. *Walkers v. Thorn*, 23 Beav. 547. *Post*, Pt. I. Bk. VI. Ch. I.
(x) 2 Moo., P. C. 480. *Fulton v. Andrew*, L. R. 7 H. L. 448. *Goodacre v. Smith*, L. R. 1 P. & D. 359.

handed down to has sanctioned *Baker v. Batt* (wisdom of this application on a fit to observe, upon this point of the expression Nicholl, in laying somewhat equiv investigation and said that, where presumption and the proof must to the knowledge 'where the cap instructions or learned judge m Wills prepared that they ought evidence in sup actual knowledge and that the inst over the instrum evidence of suc position so unde intended no mo be construed stri of law, that in Will derives a b and that not onl of proof is ther the Will, we fee to be incorrect. bandi' is this; whom the burth

(y) 2 Moore, P.

handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker v. Batt* (y). Their Lordships are fully sensible of the wisdom of this rule, and of the importance of its practical application on all occasions. At the same time they think it fit to observe, especially as there has been some discussion upon this point towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this nature. It is said that, where the party benefited prepares the Will, 'the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper:' and that, 'where the capacity is doubtful, there must be proof of instructions or reading over.' If by these expressions the learned judge meant merely to say, that there are cases of Wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them extending to clear proof of actual knowledge of the contents by the supposed testator, and that the instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood. In all probability, the learned judge intended no more than this. But if the words used are to be construed strictly: if it is intended to be stated, as a rule of law, that in every case in which the party preparing the Will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is thereupon required from the party propounding the Will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term '*onus probandi*' is this; that if no evidence is given by the party on whom the burthen is cast, the issue must be found against

Meaning of
term *onus pro-*
bandi.

(y) 2 Moore, P. C. C. 317. See also *Hitchings v. Wood*, *ibid.* 355, 430.

him. In all cases, this *onus* is imposed on the party propounding a Will; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed: and it cannot be, that the simple fact of the party who prepared the Will being himself a legatee, is, in every case and under all circumstances, to create a contrary presumption; and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition:—A man of acknowledged competence and habits of business, worth 100,000*l.*, leaves the bulk of that property to his family, and a legacy of 10*l.* or 50*l.* to his confidential attorney, who prepared his Will: Would this fact throw the burden of proof of actual cognizance by the testator of the contents of the Will on the party propounding it, so, that, if such proof were not supplied, the Will would be pronounced against? The answer is obvious—it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a Will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case; in some of no weight at all, as in the case suggested; varying according to the circumstances, for instance the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for or reading over the instrument; they form, no doubt, the most satisfactory, but they are not the only satisfactory,

description of of the Will may would naturally might be imposable has no right in much upon the concurrence of not particularly in order to produce so great practical Lordships wish acquiescing in explained, they has fallen from full operation."

In the substance Jenner Fust, re Mr. Baron Parke the doctrines are not aware that other or different

Of

A nuncupative writing, doth do witnesses (b).

(c) 2 Curt. 225, (d) The doctrine above, in *Barry v. recognized and in subsequent cases, collected in the Work, p. 117, not (b) Swinb. Pt. Godolph. Pt. 1, called Nuncupative*

description of proof by which the cognizance of the contents of the Will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it; but it has no right in every case to require it. I have said thus much upon the rules of law applicable to this case, with the concurrence of all their Lordships who heard the argument, not particularly with a view to the decision of this case, but in order to prevent any misconception upon a subject of so great practical importance. At the same time their Lordships wish it to be distinctly understood, that, entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation."

In the subsequent case of *Durling v. Loveland* (2), Sir H. Jenner Fust, referring to these passages in the judgment of Mr. Baron Parke, observed that he acceded to every one of the doctrines and principles there laid down, but that he was not aware that the Prerogative Court had ever acted on any other or different (a).

Rule in *Barry v. Butlin* approved in subsequent cases.

SECTION VI.

Of Nuncupative Wills and Codicils.

A nuncupative testament is when the testator, without any writing, doth declare his Will before a sufficient number of witnesses (b). Before the Statute of Frauds it was of as

All nuncupative Wills (made on and after Jan. 1, 1838) are invalid:

(a) 2 Curt. 225, 227.

(a) The doctrine laid down as above, in *Barry v. Butlin*, has been recognized and acted on in many subsequent cases. See the cases collected in the 8th ed. of this Work, p. 117, note (2).

(b) Swinb. Pt. 1, s. 12, pl. 1. Godolph. Pt. 1, c. 4, s. 6. It is called Nuncupative, says Swin-

burn, a *nuncupando*, i.e. *nominando*, of naming; because when a man maketh a nuncupative testament, he must name his executor and declare his whole mind before witnesses: *ibid.* pl. 2. According to the civil law, the appointment of an executor was the essence of a Will; and if he were appointed by word of mouth, although [many

except those
made by
soldiers or
mariners.

Construction of
this exception :

as to soldiers :

great force and efficacy (except for lands, tenements, and hereditaments) as a written testament (c). But as Wills of this description are liable to great impositions, and may occasion many perjuries, that statute (29 Car. II. c. 3) laid them under several restrictions; except when made by "any soldier being in actual military service, or any mariner or seamen being at sea" (d). And now by the Statute of Wills (1 Vict. c. 26), applying to all Wills made on or after 1 Jan., 1838, nuncupative Wills (or other testamentary dispositions) are altogether rendered invalid (e). The exception, however, in favour of soldiers and mariners has been continued by the 11th section of the latter statute, which provides and enacts that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

This privilege, as it respects soldiers, has been held to be confined, by the insertion of the words "actual military service," to those who are *on an expedition*: And consequently it has been decided, that the Will of a soldier made while he was quartered in barracks, either at home (f) or in the colonies (g) is not privileged. The same was held as to the Will of a soldier made at Bangalore, in the East Indies, whilst in command of the Mysore division of the army there stationed, and who died whilst on a tour of

legacies were made and written in a Will, and many things were expressed to be done, it was considered a nuncupative Will only: Swinb. Pt. 1, s. 12, pl. 6. Godolph. Pt. 1, c. 4, s. 7.

(c) Swinb. Pt. 1, s. 12, pl. 3. Godolph. Pt. 1, c. 4, s. 6.

(d) It appears from the Preface to the Life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the

English army the full benefit of the testamentary privileges of the Roman army: 3 Curt. 531.

(e) Section 9. As to the law prior to the above date relating to nuncupative Wills, see the former editions of this Work, Pt. I. Bk. II. Ch. II. § vi.

(f) Drummond v. Parish, 3 Curt. 522.

(g) White v. Repton, 3 Curt. 813. See *In the goods of Phipps*, 2 Curt. 368. *In the goods of Johnson*, 2 Curt. 341.

inspection of the deceased was both of which that his Will extended to persons Company (k).)

So, in the case of the testator, Lord L. the naval force of residence with Wynne, that the for that he was expression in the Will made by him motion (m), the board a vessel the 4th of November where he met with injured, that he probate as being distinguished the who was living on board his ship

(h) In the good Robert. 276.

(i) Herbert v. Ho Sw. 10. See also goods of Thorne, 22 C. 24 L. J. (N. S.) P where an officer went to Africa, of joining a militia into the interior, and made before the the British settlement davit on which the probate is made mu Ibid.

(k) In the goods

Ch. II. § VI.] *Of the Wills of Soldiers or Mariners.*

inspection of the troops under his command (*h*). But where the deceased was on his way from one regiment to another, both of which were in actual military service, it was held that his Will was privileged (*i*). (The term "soldier" extended to persons in the military service of the East India Company (*k*).)

So, in the case of *The Earl of Euston v. Seymour* (*l*), the as to mariners. testator, Lord Hugh Seymour, was commander-in-chief of the naval force at Jamaica, but lived on shore at the official residence with his family: And it was held by Sir Wm. Wynne, that the testator did not come within the exception; for that he was not "at sea" within the meaning of that expression in the Act; and consequently that a nuncupative Will made by him on shore was invalid. But in a case on motion (*m*), the unattested Will of a seaman, who, while on board a vessel lying in the harbour of Buenos Ayres, on the 4th of November, 1839, obtained leave to go on shore, where he met with an accident, and was thereby so severely injured, that he died on shore on the 9th, was admitted to probate as being within the exception; and the Court distinguished the case from that of *Lord Hugh Seymour*, who was living on shore at Jamaica, only occasionally going on board his ship; but this was to be regarded as the Will of

(*h*) In the goods of Hill, 1 2 Curt. 386.
Robert. 276.

(*l*) Cited *per curiam*, 2 Curt. 339.

(*i*) *Herbert v. Herbert*, Dea. & Sw. 10. See also S. P. In the goods of Thorne, 29 Jur. 569. S. C. 24 L. J. (N. S.) P. M. & A. 131, where an officer went with his regiment to Africa, for the purpose of joining a military expedition into the interior, and his Will was made before the expedition left the British settlement. The affidavit on which the application for probate is made must be explicit: *Ibid*.

3 Curt. 530.

(*m*) In the goods of Lay, 2 Curt. 375. So also a Will made by a mariner serving on board H.M.S. "Excellent" whilst she was permanently stationed in Portsmouth Harbour, was held to be the will of a "mariner or seaman being at sea" within Section 11 of the Wills Act: In the goods of McMurdo, L. R. 1 P. & D. 540. See also In the goods of Saunders, L. R. 1 P. & D. 16.

(*k*) In the goods of Donaldson,

a seaman "at sea," although the deceased was not actually on board ship at the time the Will was made. So where an Admiral, though not actually at sea, was in a river on a naval expedition, it was held that his case fell within the spirit of the exception in the Act (*n*).

Construction of words "mariner or seaman."

As to the construction of the words "mariner or seaman," in the exception; it has been held that the purser of a man-of-war is within this description, and it should seem that it includes the whole service, applying equally to superior officers up to the commander-in-chief, as to a common seaman, being at sea (*o*). And it has also been held to apply to merchant seamen (*p*).

Persons within the exception may make their Wills though under age.

It was held by Sir II. Jenner Fust, on motion (*q*), that, notwithstanding the general provisions of the Act, a minor may make his Will if he falls within the exception as being "in actual military service, &c.;" the words of the clause being "any soldier, &c."

With respect to the making and probate of the Wills of petty officers and seamen in the Queen's service, and the non-commissioned officers of marines, and marines serving on board a ship in the Queen's service, several statutes have been passed containing regulations calculated to counteract the frauds and impositions to which they are liable. These, however, have been repealed, and other provisions for the same purpose substituted, by the statute 28 & 29 Vict. c. 72, which will be pointed out, when the subject of the probate of Wills occurs (*r*).

Provisions of stat. 28 & 29 Vict. c. 72, as to Wills of seamen.

(*n*) In the goods of Austen, 2 Robert. 611.

(*o*) In the goods of Hayes, 2 Curt. 338. A surgeon in the Navy is a "mariner or seaman" within the section: In the goods of Saunders, L. R. 1 P. & D. 16. As to the meaning of the term "seaman and mariner" in sect. 2

of stat. 28 & 29 Vict. c. 72: see *post*, Pt. I. Bk. IV. ch. III.

(*p*) *Morrell v. Morrell*, 1 Hag. 51. In the goods of Milligan, 2 Robert. 108. In the goods of Parker, 2 Sw. & Tr. 375.

(*q*) In the goods of Farquhar, 4 Notes of Cas. 651, 652.

(*r*) See *post*, Pt. I. Bk. IV. Ch. IV.

OF THE

THERE has is in all cases w a man make hi strongest and because his ow law to make t revocable (*a*). until the death

It has already is unknown to One ground of mentary, is its it should seem, compact. In I the wife of Mr. Will of her au mutual Will, v husband died; made another in the power o Camden, C. "

(*a*) *Vynior's ca* Swinb. Pt. 7, s. 14

(*b*) The making the inception of it take effect till th testator: for *on morte consummatu et ambulatoria ut*

CHAPTER THE THIRD.

OF THE REVOCATION OF WILLS OF PERSONALTY.

THERE has already been occasion to observe that a Will is in all cases whatever a revocable instrument. For though a man make his Testament and last Will irrevocable in the strongest and most express terms, yet he may revoke it; because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable (a). A Will is, therefore, said to be *ambulatory* until the death of the testator (b).

Ambulatory and revocable nature of a Will.

It has already been stated that a mutual and conjoint Will is unknown to the testamentary law of this country (c). One ground of objection to such an instrument as testamentary, is its irrevocability. However, such a Will may, it should seem, in some cases, be enforced in Equity as a compact. In *Dufour v. Pereira* (d), Mrs. Camilla Rancer, the wife of Mr. Rancer, being entitled to a legacy under the Will of her aunt, she and her husband agreed to make a mutual Will, which they did, and both executed it; the husband died; the wife proved his Will, and afterwards made another Will. And the question was, whether it was in the power of the wife to revoke the mutual Will. Lord Camden, C. "This question arises on a mutual Will of the

Mutual Will : whether ever irrevocable in Equity.

(a) Vynior's case, 8 Co. 82, a. Swinb. Pt. 7, s. 14, pl. 2.

(b) The making of a Will is but the inception of it, and it doth not take effect till the death of the testator: for *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum*

Vita exitum. Then it would be against the nature of a Will to be so absolute, that he who makes it cannot countermand it: Forse and Hembling's case, 4 Co. 61 b.

(c) *Ante*, p. 8.

(d) 1 Dick. 419.

husband and wife; the Will is jointly executed by them; what the wife disposes of, is the residue of her aunt's estate, given to her by her Will. I do not find the cases go so far, as to consider a legacy to a wife, as excluding the husband by implication: but there is no occasion to determine that question: the question is, as the husband by the mutual Will assents to his wife's right, and makes it separate, whether the second Will by the wife is to be considered as void. It struck me at first, more from the novelty of the thing than its difficulty. The case must be decided by the laws of this country. The Will was made here; the parties lived here; and the funds are here. Consider how far the mutual Will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly, it might have been revoked separately, provided the party who intended it had given notice to the other of such revocation. But I cannot be of opinion, that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another Will. It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not. The defendant, Camilla Rance, hath taken the benefit of the bequest in her favour by the mutual Will, and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion, the last Will of the wife, so far as it breaks in upon the mutual Will is void. And I declare, that Mrs. Camilla Rance, having proved the mutual Will, after her husband's death, and having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual Will; and therefore let the necessary accounts be taken" (c).

(c) See this judgment also reported in 2 Hargr. Jurid. Arg. 272, 2 Hargr. Jurid. Exere. 101.

This case was *Orford (f)*, where in 1756, and Horace Lord Walpole in 1756, made a codicil to his last Will of revocation of his Will of 1756. A case Walpole in 1756, revocable by either and Lord Orford judgment of Lord Orford relied on in support, however, refused, but this was chief and, in some sense, leaves the principle *Pereira* wholly un-

And here it must always be revocable, yet such a contract, good consideration, Statute of Frauds, intention as distinct, although such revocation acted on and in

(f) 3 Ves. 402.

(g) See 1 Add. 2, learned Reporter Blackburn, and a grave's remarks on Walpole v. Lord Orford, Arg. 272. 2 Jurid. also Chester v. Ur-

This case was succeeded by that of *Walpole v. Lord Orford* (*f*), where the Will of George, Earl of Orford, made in 1756, and Horace Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual Will. Horace Lord Walpole died in 1757, without revoking his part of the mutual Will, namely the codicil of 1756; George Earl of Orford died in 1791, when it appeared that he had made a codicil in 1776; and this by reason of a reference to his last Will, bearing date in 1752, was construed a revocation of his part of the mutual Will, namely, the Will of 1756. A case was then raised in Equity, that the mutual Will of 1756 became irrevocable on the death of Lord Walpole in 1757, though it was admitted to have been revocable by either during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the judgment of Lord Camden in *Dufour v. Pereira*, was mainly relied on in support of that position. Lord Loughborough, however, refused to enforce the compact of the mutual Will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord Camden's decision in *Dufour v. Pereira* wholly unshaken (*g*).

And here it may be right to mention that, although a will is always revocable notwithstanding a contract not to revoke it, yet such a contract is not illegal and is enforceable if made for good consideration and in such form as to comply with the Statute of Frauds (*h*). But a mere representation of an intention as distinguished from a contract cannot be enforced, although such representation may have been intended to be acted on and in fact have been acted on (*i*).

Of contracts
not to revoke.

(*f*) 3 Ves. 402.

(*g*) See 1 Add. 278, note by the learned Reporter to *Hobson v. Blackburn*, and also Mr. Hargrave's remarks on the case of *Walpole v. Lord Orford*, in 2 Jurid. Arg. 272. 2 Jurid. Ex. 101. See also *Chester v. Urwick*, 23 Beav.

407.

(*h*) *Hammersley v. De Biel*, 12 Cl. & F. 45. *Robinson v. Ommanney*, 23 C. D. 285.

(*i*) *Maddison v. Alderson*, 8 A. C. 467, disapproving *Loffus v. Maw*, 3 Giff. 592, in which case Stuart, V.-C. held that, where a

1 Vict. c. 26,
s. 20. No Will
to be revoked
but by another
Will or codicil,
or by a writing
executed like a
Will, or by
destruction :

By stat. 1 Vict. c. 26, s. 20, it is enacted, "that no Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, [*i.e.* by marriage under sect. 18,] or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same (k) and executed in the manner in which a Will is hereinbefore required to be executed (l), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

1 Vict. c. 26,
s. 21. No
alteration in a
Will shall have
any effect
unless executed
as a Will.

And by sect. 21, it is further enacted, "that no obliteration, interlineation, or other alteration made in any Will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

testator had induced his niece to continue her services on the faith that he would leave her certain property, and took her to his solicitor's office to see a codicil to that effect, the niece was entitled to have the trusts in her favour, thereby declared, performed, notwithstanding the fact that the testator had by a subsequent codicil revoked the codicil in her favour.

(k) Where a testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it

had written the words signed by him, self and attested by two witnesses, "we are witnesses of the erasure of the above," it was held that the codicil was revoked, for the words were "a writing declaring an intention to revoke" it within this section. In the goods of Gosling, 11 P. D. 79.

(l) There seems to be some doubt as to whether a writing which only revokes the will to which it is attached ought to be admitted to probate: In the goods of Fraser, L. R. 2 P. & D. 40. See

It may here enactment cont delegate his pov clause conferin death (m).

Revocation by

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It is obvious, revoked in the n that "no Will, d than, &c., or by the same," &c. (k)

And as to p sect. 21, that no c made after the c (except so far as alteration shall n be executed in li th: Will.

By the sixth respect to devis confined to "bu same."

This section, l

In the Goods of P. & D. 683. In Hubbard, L. R. 1 P (m) Stockwell v.

It may here be observed that, by reason of the above enactment contained in the 20th section, a testator cannot delegate his power of revoking the Will, by inserting in it a clause conferring on another an authority to destroy it after his death (m).

A testator cannot authorize a Will to be destroyed after his death.

SECTION I.

Revocation by Destruction, Burning, Tearing, Cancellation, or Obliteration.

It will be observed, that the 20th section of the Wills Act confines the modes of total revocation by means of any act done to the instrument itself, to "burning, tearing, or otherwise *destroying*." 1 Vict. c. 26, s. 20:

It is obvious, also, that a part only of a Will may be revoked in the manner here described; for the statute says that "no Will, or any part thereof, shall be revoked otherwise than, &c., or by the burning, tearing, or otherwise destroying the same," &c. (n).

And as to partial revocation, it is further enacted by sect. 21, that no obliteration, interlineation, or other alteration, made after the execution, shall be valid or have any effect, (except so far as the words or effect of the Will before such alteration shall not be apparent) unless such alteration shall be executed in like manner as is required for the execution of the Will. s. 21:

By the sixth section of the Statute of Frauds, with respect to devises of lands, revocations of this nature were confined to "burning, cancelling, tearing, or obliterating the same." Statute of Frauds, s. 6.

This section, however, did not extend to Wills of personal Statute of Frauds, s. 22.

In the Goods of Hicks, L. R. 1 Robert. 661, per Sir H. Jenner P. & D. 683. In the Goods of Fust.
Hubbard, L. R. 1 P. & D. 53. (n) Clarke v. Scripps, 2 Robert.
(m) Stockwell v. Ritherdon, 1 563, 567, by Sir J. Dodson.

property; but with respect to them it was merely provided, by sect. 22, that no Will concerning any goods or chattels or personal estate should be repealed or altered "by any words."

To what cases the Wills Act extends :

every act done to a Will after Jan. 1, 1838, must be in compliance with the statute though the Will be made before that date.

Presumption as to when alterations, &c., shall be presumed to have been made.

The 34th section of the Wills Act enacts, that "this Act shall not extend to any Will made before the 1st day of January, 1838;" but the interpretation of the Act, which has been adopted by the Prerogative Court, and approved by the Privy Council, is, that the operation of the Act was meant only to be suspended with respect to the execution of such Wills as were already made at the passing of the Act and those made between the passing of the Act and the 1st of January, 1838, and that a Will made before the statute came into operation is not exempted from the necessity of complying with the provisions of the new law *with respect to any act done to it after that period* (o).

As to the question whether, in a case where unattested alterations appear on the face of a Will, and no information can be given, and there are no circumstances, one way or the other, to show when the alterations were made, the presumption is, that they were made before or after the execution of the Will, it has been established by the judgment of the judicial committee of the Privy Council, in *Cooper v. Bockett* (p), (which has been confirmed by several subsequent cases (q)), that the presumption in such a case is that the alterations were made *after* the

(o) *Hobbs v. Knight*, 1 Curt. 768. *Croker v. Lord Hertford*, 4 Moo. P. C. 339, 356.

(p) 4 Notes of Cas. 685. S. C. 4 Moo. P. C. 419.

(q) *Gann v. Gregory*, 3 De G. M. & G. 780, by Lord Cranworth. *Doe v. Palmer*, 16 Q. B. 747. In the goods of James, 1 Sw. & Tr. 238. In the goods of White, 30

L. J., P. & M. 55. But in *Williams v. Ashton*, 1 Johns. & H. 115, 118, Wood, V.C., said he did not think it was quite a correct mode of stating the law, to say that alterations in a Will are presumed to have been made at one time or at another; but that the correct view is that the *onus* is cast on the party who seeks to derive an ad-

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execution (r). So where a Will and codicil were in the testator's custody, and the Will is found mutilated after his death, in the absence of evidence, the presumption is that it was mutilated by the testator, after the execution of

Presumption in absence of evidence where Will found mutilated after testator's death.

vantage from an alteration in a Will, to adduce some evidence from which a jury may infer that the alteration was made before the Will was executed.

(r) In order to rebut this presumption, declarations of the testator, before the execution of his Will, that he intended to provide by his Will for a person who would be unprovided for without the alteration in question, are admissible evidence; but not declarations, after the execution, that the alteration had been made previously: *Doe v. Palmer*, 16 Q. B. 747. *Dench v. Dench*, 2 P. D. 60. See *post*, Pt. I. Bk. IV. Ch. III. § V. But where the deceased executed a Will and codicil, the latter referring to the former by its date, the name of the executor appointed by the Will being written on an erasure, the Court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the Will and granted probate of the Will and codicil to such executor: In the goods of *Sykes*, L. R. 3 P. & D. 26. The fact that a date is affixed to the alteration is not evidence to rebut the presumption: In the goods of *Adamson*, L. R. 3 P. & D. 253. It is not sufficient to prove that the testator told the witnesses at the time of attestation, that he had made some alterations in his Will, but did not allow them to see what the alterations were: *Williams v. Ashton*,

1 Johns. & H. 115. But when a Will has been prepared in the first instance with the amounts of the legacies in blank, and the amounts, involving, for want of space, some interlineations and alterations, have been afterwards filled in by the testator himself, the Court will presume that they were filled in previous to execution: for it cannot be supposed that the execution was prior to the insertion of the legacies: *Birch v. Birch*, 1 Robert. 675. In the goods of *Cadge*, L. R. 1 P. & D. 543. And the mere circumstance of the amount of a legacy, or name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, "or other alteration" within the meaning of the statute; nor does any presumption arise against the Will having been duly executed as it appears: *Greville v. Tylee*, 7 Moo. P. C. 320. See also In the goods of *Swindin*, 2 Robert. 192. Where some trifling alterations and interlineations appeared on the face of a holograph Will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert that, in his opinion, they were written at the same time as the rest of the Will, on that evidence the Court admitted them to probate: In the goods of *Hindmarch*, L. R. 1 P. & D. 307.

Presumption as to alterations in Will dated on or after 1 Jan., 1838.

Presumption not altered by fact that codicil has been duly executed.

No presumption as to alterations where Will is dated before 1 Jan., 1838.

Presumption in absence of evidence in case of unattested undated Will.

Act of Revocation before 1 Jan. 1838.

the codicil (*s*). Consequently, if the Will is dated on or after Jan. 1st, 1838, it is obvious that the alterations also must be taken to have been made after the new Act came into operation. It has also been held, that this presumption is not at all varied or altered by the circumstance of a codicil to the Will having been duly executed: The presumption of law must still be that the alterations were made after the execution of the codicil (*t*); unless there be proof or internal evidence to the contrary, in which case the codicil, being a republication of the Will, would republish the Will with the alterations (*tt*).

But if the Will is dated *before* the 1st of Jan., 1838, the point does not appear to be yet settled, whether the presumption is that they were made before or after the Act came into operation; for though they must be taken to have been made after the execution of the Will, it does not follow that they were on or after Jan. 1st, 1838 (*u*). It may be observed that in the instance of an unattested Will without date, where the case is bare of circumstances from which the time when it was made may be inferred, it has been held that the presumption is that it was made before the Act came into operation (*v*).

With respect to what shall amount to an act of destruction, if done before January 1, 1838, sufficient to operate as a total revocation, see the former Editions of this Work, Pt. I., Bk. II., ch. 3, § 1.

(*s*) *Christmas v. Whinyates*, 3 Sw. & Tr. 81.

(*t*) *Lushington v. Onslow*, 6 Notes of Cas. 183. In the goods of Bradley, 5 Notes of Cas. 186.

(*tt*) In the goods of Sykes, L. R. 3 P. & D. 26. *Tyler v. Merchant Taylors Co.*, 15 P. D. 216.

(*u*) See in the goods of Pennington, 1 Notes of Cas. 399. *Wynn v. Heveringham*, 1 Coll. 630.

(*v*) *Pechell v. Jenkinson*, 2 Curt. 273, *ante*, p. 64. And on the au-

thority of this case, and of In the goods of Pennington, *ante*, note (*u*), Sir C. Cresswell held, *hæc tenet*, that the presumption is the same as to alterations: In the goods of Streaker, 28 L. J., P. M. & A. 50. See also *Benson v. Benson*, L. R. 2 P. & D. 172. As to presumptions in the case of alterations in a will of an officer in actual service, see In the goods of Tweedale, L. R. 3 P. & D. 204.

With respect after the Wills that the words in the Statute of the Wills Act, are substituted. words mean r cutting, throwing exclude cancelling narrower constru of a Will under destruction or an In *Hobbs v. Knibb* the excision of the cation of the Will and that it was cation, that the w sufficient if the ex In the present c part of the Will, proceeded to stat upon the same p Will by obliteration amounted to a de obliterated it that parity of reasoning

(*v*) Sugden's Essay relation by striking a pen is not a revoc the Wills Act: *Stephens v. Stephens*, 2 Curt. 458. In the striking through *animus revocandi*: In *Re Rose*, 4 Not. of Cas. 1 goods of Brewster, 29 M. 69. A symbolic bearing, or destruction do: there must be the intention. All

With respect to the acts of destruction or cancellation done after the Wills Act came into operation: It will be observed, that the words "cancelling" and "obliterating," which occur in the Statute of Frauds, are omitted in the 20th section of the Wills Act, and that the words "otherwise destroying," are substituted. It has been considered that these latter words mean modes of destruction *ejusdem generis*, as cutting, throwing into water, or the like, and, therefore, exclude cancelling (*w*). And it has been argued, that a still narrower construction ought to prevail, *viz.* that a revocation of a Will under the new law, by any mode short of actual destruction or annihilation, can only be by burning or tearing. In *Hobbs v. Knight* (*x*), Sir Herbert Jenner Fust held, that the excision of the name of the testator amounted to a revocation of the Will under the terms "otherwise destroying" (*y*); and that it was not necessary, in order to operate a revocation, that the whole instrument should be destroyed; it was sufficient if the entirety or essence of the thing were destroyed: In the present case, the name of the testator, an essential part of the Will, had been removed: And the learned judge proceeded to state that the inclination of his opinion was, upon the same principle, that a testator might revoke his Will by obliterating his signature to it, if the obliteration amounted to a destruction; if the testator had so carefully obliterated it that it was perfectly illegible: And further, by parity of reasoning, that if the names of the attesting wit-

What shall amount to a revocatory act of destruction if done after 1 Jan., 1838.

Meaning of "otherwise destroying."

(*w*) Sugden's Essay, p. 46. Cancellation by striking through with a pen is not a revocation under the Wills Act: *Stephens v. Tappin*, 2 Curt. 458. Even though the striking through be done *in animo revocandi*: In the goods of *Rose*, 4 Not. of Cas. 101. In the goods of *Brewster*, 29 L. J. P. & M. 69. A symbolical burning, tearing, or destruction will not do: there must be the act as well as the intention. All the destroy-

ing in the world without intention will not revoke a Will: nor all the intention in the world without destroying: there must be the two: *Per James, L.J., Cheese v. Lovejoy*, 2 P. D. 251—253.

(*x*) 1 Curt. 768.

(*y*) It is sufficient revocation within the section if the signature of the testator is scratched out as with a knife: In the goods of *Morton*, 12 P. D. 141.

nesses were taken away by the testator *animo revocandi*, it would be a good destruction of the Will under the Act: The learned judge likewise observed, that if the signature had been burnt or torn out, that would be clearly sufficient to revoke: and that if it were necessary to determine the point, he thought it would not be difficult to hold, that cutting is equivalent to tearing. This decision was cited by Sir John Dodson in *Clarke v. Scripps* (z); And that learned judge said, that he quite agreed with Sir H. J. Fust, that cutting and tearing are equivalent acts (zz).

It was held, in the construction of the Statute of Frauds, that in order to operate a revocation of a Will, it was not necessary that the instrument itself should be consumed or torn to pieces (a).

It was decided, however, that there must be an actual burning of the Will to some extent, in order to effect a revocation of this nature; and that an intention and attempt to burn was insufficient (b).

There seems to be no reason why these decisions should not be applied to the Wills Act. But assuming them to be adopted as authorities in its construction, it is difficult to state any precise rule with respect to the extent to which the burning or tearing of the Will must go, in order to

(z) 2 Rob. 563, 570, 575.

(zz) Where, however, the Will was found with the testator's original signature erased, but another signature appeared at a short distance beneath, Dr. Lushington held, on the facts and circumstances deposed to, that the original signature had not been erased *animo revocandi* as required by the new Wills Act, and that in the probate the original signature must be restored, and the second omitted: In the goods of King, 2 Robert. 403. See also In the goods of Coleman, 2 Sw. & Tr. 314. But

where on the death of the deceased a will was found the signature to which had been cut out but gummed to its former place, it was held that the presumption of revocation was not rebutted although there was evidence of declarations by the deceased of intention to benefit his wife by Will: *Bell v. Fothergill*, L. R. 2 P. & D. 148.

(a) *Bibb v. Thomas*, 2 W. Black. 1043.

(b) *Doe v. Harris*, 6 A. & E. 209. S. C. 2 Nev. & P. 615.

Actual burning necessary: intention and attempt to burn insufficient.

effect a revocation Lord Denman now, whether it is sufficient as to the instrument itself must be burnt; which the Will torn or burnt, was done with burnt, or whether fewer pieces, it said, "The question destroyed wholly to say; but the revoke as destroyed then be said, the was:" And Sir in *Hobbs v. King* question thus to the construction

The same view subsequent cases of the Exchequer *animo revocandi* of its being a declaration *Tyler* (e), where the signing clause a his hand to the testator had the part of his Will tearing them off the above-mentioned the principle of the goods of *Har-*

(e) *Ante*, p. 115.

(d) 3 H. & N. 34.

effect a revocation: In giving judgment, in *Doe v. Harris*, Lord Denman observed, that doubt might be entertained now, whether the proof given in *Bibb v. Thomas* would be sufficient as to the acts of burning and tearing: Patteson, J., said, "There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the Will is:" Williams, J., said, "The Will must be torn or burnt, and the question will always be whether that was done with intention to cancel; how much should be burnt, or whether the Will should be torn into more or fewer pieces, it is not necessary to lay down:" Coleridge, J., said, "The question is put, whether the Will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke as destroys the entirety of the Will: because it may then be said, that the instrument no longer exists as it was:" And Sir Herbert Jenner Fust, in giving judgment in *Hobbs v. Knight (c)*, cited and adopted the view of the question thus taken by Mr. Justice Coleridge as applicable to the construction of the new statute.

The burning must be such as to destroy the entirety of the Will.

The same view has been taken by the Courts in several subsequent cases; as in *Price v. Powell (d)*, where the Barons of the Exchequer regarded the tearing off the seal of a Will *animo revocandi* as amounting to a revocation of it by reason of its being a destruction of its entirety. So in *Williams v. Tylzy (e)*, where there was the usual statement in the witnessing clause at the end of a Will that the testator had set his hand to the preceding pages, Wood, V. C., held, that the testator had thereby made the signatures on those pages a part of his Will, and that the whole Will was revoked by tearing them off, *animo revocandi*; and his Honour relied on the above-mentioned case of *Price v. Powell*, and approved of the principle on which it had been decided. Again, in *the goods of Harris (f)*, where a testatrix, having executed

Above view approved in subsequent cases.

(c) *Ante*, p. 115.

(e) Johns. 529.

(d) 3 H. & N. 341.

(f) 3 Sw. & Tr. 485.

her Will by signing her name at the foot of each sheet, cut off the signatures on the first five sheets, and cancelled her own signature at the end of the last sheet, writing underneath that she had cancelled the Will on a certain day: The last sentence in her Will in effect referred to the signatures she had cut off as giving validity to the Will: And it was thereupon considered by Sir J. P. Wilde that the Will was destroyed in its entirety, and could not be admitted to probate. So *In the goods of Lewis (g)*, the Will was held by Sir C. Cresswell to be revoked by tearing off the signatures and attestation. And in another case, before the same judge, *In the goods of Gullan (h)*, where the testator had subscribed each of the several sheets of which his Will consisted at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed each sheet in his presence, and on his death two of the middle sheets of the Will only could be found; it was held that the signatures at the end of the Will, being the only ones made in compliance of the statute, having been destroyed, the whole Will was revoked, and the sheets that had been found, though duly attested, could not be admitted to probate.

It must be here observed, that if the act of destruction or cancellation be inchoate and incomplete, it will not amount to a revocation. Thus in *Doe v. Perkes (i)*, it appeared that the testator, being moved with a sudden impulse of passion against one of the devisees under his Will, conceived the intention of cancelling it, and of accomplishing that object by tearing: Having torn it twice through, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him: He then proceeded no further, and after having fitted the pieces together, and found that no particular word had been obliterated, he said, "It is a good job it is no worse." Upon this evidence, it was left to the jury to say whether the testator

(g) 1 Sw. & Tr. 31.

(h) *Ibid.* 125.(i) 3 B. & A. 489. See *Accord*.*In the goods of Colberg*, 2 Curt.832. *Giles v. Warren*, L. R. 2 P.

& D. 401.

Inchoate and incomplete cancellation shall not revoke.

had done all he had intended in completing the Will, that he was so held, that their revocation of the

(k) Mr. Justice whom this case was coming up the evidence observed that the Statute of Frauds made a tearing of a Will a revocation. "And the learned judge, said, that the cancellation since the statute the effect could not be before the statute case of *Hyde v. Hyde* (p. 127,) there was a Will; but it was held to be a revocation, because not, from the circumstance, be any inference to revoke. So the act may be intended not amount to a revocation was the case in *O'Connell* (post, p. 126,) the testator was held to be mistaken. It does not seem to be a mistake; for the tearing, in that degree, at least for the time, with the intention of producing the effect of the destruction was a subsequent declaration that the testator would be of the Will could not be revoked except by a declaration of it, in the presence of witnesses. One question before us, whether such a complete declaration will as to amount to a revocation, and that is purely a question of fact. If the testator's acts wholly to

had done all he intended, or whether he was prevented from completing the act of destruction he intended: They found that he was so prevented, and the Court of King's Bench held, that their verdict was right, and that there was no revocation of the Will (k).

(k) Mr. Justice Holroyd, before whom this case was tried, in summing up the evidence to the jury, observed that the sixth section of the Statute of Frauds does not make a tearing *merely* and *of itself* a revocation. "A tearing," said the learned judge, "is not a revocation since the statute, if the same effect could not be ascribed to it before the statute passed. In the case of *Hyde v. Hyde*, (see *post*, p. 127,) there was a tearing of the Will; but it was held not to amount to a revocation, because there could not, from the circumstances of that case, be any inference of an intention to revoke. So the act of tearing may be intentional, and yet not amount to a revocation; if, as was the case in *Onions v. Tyrer*, (*post*, p. 126,) the tearing be ascribed to mistake. This, however, does not seem to be a case of mistake; for the tearing was in some degree, at least for some period of time, with the intention of destroying the effect of the Will; and if the destruction was complete, the subsequent declarations of the testator would be of no avail since the Will could not be again set up, except by a codicil or republication of it, in the presence of three witnesses. One question will therefore be, whether there has been such a complete destruction of the Will as to amount to a revocation; and that is purely a question of fact. If the testator intended by his acts wholly to revoke, the revo-

cation will be complete; but the question which arises upon the evidence, and which question alone renders the subsequent declarations of the testator admissible, is, whether he had proceeded as far as he intended in the destruction of the Will. If, after he had torn the Will in the manner in which it appears from the evidence that he did, he had thrown it upon the ground, that might have been a circumstance from which to have inferred that the act of destruction was complete. A case may be put of a person throwing his Will on the fire, with the intention of burning it, and in consequence of some observation made by a bystander snatching it off again before it be burnt; there, although the Will be scorched, I do not apprehend that it would amount to a revocation, since the act of destruction by the testator would not in such a case have been completed. The question of intention, however, is purely a question of fact; and therefore, exclusively within the province of the jury to decide. If the jury think that what the testator intended at the time he tore the Will was completed, the heir at law is entitled to recover; but if they think that his intention at that time was not completed, the question of law then arises; and I am of opinion that it will not in point of law amount to a revocation." Gow. 186.

In accordance with this authority, the case of *Elms v. Elms* (l) was decided. In that case the testator tore the Will almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing Will before making another: Sir Cresswell Cresswell laid down the law to be, that in order to revoke a Will by tearing it, it is not necessary to rend the Will into more pieces than it originally consisted of, but that it is sufficient if the testator intended the tearing actually done of itself to work a revocation without any further act—in other words, if when he ceased tearing, he had done all that he contemplated doing for the purpose of revoking: But the learned judge, having regard to all the evidence in the case, was not satisfied that the testator did so intend, and therefore held that the Will was not revoked.

Act of revocation must take place in testator's presence:

and by his direction.

It should be borne in mind that to operate a revocation, the act of "burning, tearing, or otherwise destroying," is required by the 20th section to be done by the testator or by some person *in his presence*, and *by his direction* (m). Therefore, in a case where a codicil had been burnt by the testator's order with intent to revoke, *but not in his presence*, probate was decreed of a draft copy of the codicil (n). And where the Will of a testatrix was destroyed in her presence, *but without her consent or authority*, by a relative, and subsequently the testatrix, though pressed to do so, refused to make a new Will (saying that she could not bring her mind to it, and that it must remain as it was), it was held, that there was no sufficient evidence of a subsequent ratification of the destruction of the Will so as to constitute it an act done *by the direction and by the authority* of the testatrix (o).

(l) 1 Sw. & Tr. 155.

(m) See *ante*, p. 110.

(n) In the goods of Dadds, Dea. & Sw. 290.

(o) *Mills v. Millward*, 15 P. D. 20. *Quære*, however, whether where a Will has been destroyed

not only without the authority of the testatrix, but against her wish, any subsequent ratification of the act of destruction will make it a revocation within sect. 20 of the Wills Act (1b).

It has already been mentioned that the Will was torn in the manner that if the testator had torn part only of it, the portions of it, as will amount to the destruction with which the testator intended to be attributed shall effect the revocation in some and what part wholly, or only the expressed direction of doing the act, may be inferred from the instrument has been accordingly, in *Clarke v. Clarke* Will in 1848, and when it was found with the signatures remaining. J. Dodson, (after a statement of the facts in the absence of the testatrix, considered, from the evidence, that the Will were effected, that the testatrix intended to revoke the Will only; and that the draft of a new

(p) *Ante*, p. 111.

(q) In the goods of the testatrix. Notes of Cas. 131. of Cooke, 5 Notes of Clarke v. Scripps, 572.

(r) *Clarke v. Scott*, 567. In the goods

It has already been pointed out, that under the 20th section of the Wills Act, a part only of a Will may be revoked in the manner described (*p*). Accordingly, it has been held that if the testator after the execution of the Will destroy part only of it, by tearing or cutting away, or cutting out portions of it, *animo revocandi* as to the parts so removed, this will amount to a revocation *pro tanto* (*q*). But with respect to the destruction of a part, it should seem that the intention with which the act is done must govern the extent of operation to be attributed to the act, and determine whether it shall effect the revocation of the whole instrument, or only of some and what portion of it (*r*). And the intention to revoke wholly, or only in part, may be evidenced either by proof of the expressed declaration of the testator of his intention in doing the act, or by proof of circumstances from which it may be inferred, or by the state and condition to which the instrument has been reduced by the act itself (*s*). Accordingly, in *Clarke v. Scripps* (*t*), where a testator executed his Will in 1843, and it remained in his custody until his death, when it was found in a mutilated state, torn and cut, but with the signatures of the testator and of the attesting witnesses remaining at the end of the Will, it was held by Sir J. Dodson, (after a full and able review of all the cases, and a statement of the principles to be derived from them), that in the absence of extrinsic evidence, it ought to be considered, from the peculiar manner in which the mutilations were effected, that the testator (who died suddenly) did not intend to revoke the whole Will, but to revoke it in part only; and that the papers, as altered, were intended for a draft of a new Will, and which should itself operate as his

Effect (under the Wills Act, s. 20) of mutilating part of the Will.

Intention of testator governs extent of the operation.

Evidence of intention to revoke wholly or only in part.

(*p*) *Ante*, p. 111.

(*q*) In the goods of Lambert, 1 Notes of Cas. 131. In the goods of Cooke, 5 Notes of Cas. 390. *Clarke v. Scripps*, 2 Robert. 563, 572.

(*r*) *Clarke v. Scripps*, 2 Robert. 567. In the goods of Woodward,

L. R. 2 P. & D. 206.

(*s*) *Clarke v. Scripps*, 2 Robert. 568. *Williams v. Jones*, 7 Notes of Cas. 106. In the goods of Maley, 12 P. D. 134.

(*t*) 2 Robert. 563. But see *Treloar v. Lean*, 14 P. D. 49.

Will, should he die without completing his object of making a formal one. Accordingly, in *Christmas v. Whynates* (u), where part of the top of the second sheet of a Will with a codicil had been cut off, including the signature of the testatrix on the upper part of the second side, Sir Cresswell Cresswell, judging from the manner in which the Will and codicil had been cut, care having been taken to avoid cutting off the names of the attesting witnesses on the sheet that had been mutilated, and the signature and attestation of the codicil being left untouched, that the intention of the testatrix was only to revoke as much of the Will as had been cut off, and to preserve the codicil and so much of the Will as remained; and probate was accordingly decreed of the Will as it then stood and the codicil (x). In a late case, where a testator after duly executing his Will (which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses,) took out three sheets and substituted three new ones, which he signed which were not attested, and did not alter the date of the Will nor resign it, nor was the Will re-attested; it was held, that the Will was not entitled to probate (y).

Partial revocation by obliteration, destruction, interlineation or other alteration under the old law.

Under Wills Act, s. 21; formalities necessary for obliterations and other alterations:

As to partial revocation by cancellation or obliteration prior to the Wills Act, see the former Editions of this Work, Pt. I., Bk. II., Ch. 3, § 1, and the case of *Swinton v. Bailey* (z).

With respect to alterations and obliterations made since the Wills Act came into operation (1st Jan., 1838), it is required (sect. 21), in order to give effect to any obliteration, interlineation, or other alteration, that such alteration shall be executed as is required for the execution of the Will, with this difference, that the signature of the testator and the subscription of the witnesses (a) need not be at the foot

(u) 3 Sw. & Tr. 81.

(x) See also in the goods of Woodward, L. R. 2 P. & D. 206, that the mere cutting off three lines from the beginning of the Will does not, without other cir-

cumstances, show an intention to revoke the whole Will.

(y) Treloar v. Lean, 14 P. D. 49.

(z) 1 Ex. D. 110; 4 App. Cas. 70.

(a) The initials of a testatrix

or end of the Will, or other part of the Will, at the foot or end of the Will, or to such alteration of the Will (b).

The statute (sect. 21) "except so far as such alteration shall be made out what the words are contained in the Will and probate must be made of the Will (c).

and the attesting witnesses in the margin of a Will or in the interlineations or in the goods of Blewitt, 5 P. D. 10.

(b) Where a testatrix, in signing of his Will, certain leasehold houses, the benefit of his children, words describing of houses were struck through, and at the end of the clause was interlined, such house to his wife, the signature of the testatrix, the witnesses a memorandum signed and attested with the effect that the above had been struck out for the testator's wife, Sir Cresswell held, that the memorandum referred to the interlineation as to the obliteration.

of Treeby, L. R. 3 P. D. 10. See further as to the signature of the attesting witnesses, L. R. of Wilkinson, 6 P. D. 10.

(c) In a case on motion Jenner Fust ordered, that in a Will should

or end of the Will, but may be made in the margin or some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will (b).

The statute (sect. 21) contains an exception in this respect, viz. "except so far as the words and effect of the Will before such alteration shall not be apparent." Consequently, if the words are completely obliterated, so that it cannot be made out what they originally were, the obliteration is valid, and probate must then be granted, as if there were blanks in the Will (c).

consequences
of complete
obliteration :

and the attesting witnesses in the margin of a Will opposite interlineations are sufficient to render the interlineations valid. In the goods of Blewitt, 5 P. D. 116.

(b) Where a testator at the beginning of his Will disposed of certain leasehold houses for the benefit of his children, and the words describing one of such houses were struck through by a pen, and at the end of the Will a clause was interlined bequeathing such house to his wife, and under the signature of the deceased and the witnesses a memorandum duly signed and attested was added, to the effect that the above words had been struck out for the benefit of the testator's wife, Sir J. Hannen held, that the memorandum referred to the interlineation as well as to the obliteration. In the goods of Treeby, L. R. 3 P. & D. 242. See further as to the position of the signature of the testator and attesting witnesses, In the goods of Wilkinson, 6 P. D. 100.

(c) In a case on motion, Sir H. Jenner Fust ordered, that the erasures in a Will should be carefully

examined in the Registry, with the help of glasses, by persons accustomed to writing, to ascertain whether they could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank: In the goods of Ibbetson, 2 Curt. 337. See also In the goods of Beavan, 2 Curt. 369. In the goods of James, 1 Sw. & Tr. 238. But in a recent case Sir J. Hannen refused to order a piece of paper on which a new bequest was written, and which was pasted over a whole legacy, to be removed, and directed probate to issue in blank as to that legacy. In the goods of Horsford, L. R. 3 P. & D. 211. Generally speaking, the Court of Probate will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out. If it be asserted in an allegation that they are capable of being distinguished on the face of the Will, the Court will refer such an allegation to proof, and then pronounce its judgment according to the testimony

evidence
aliunde inad-
missible :

consequences
of complete
obliteration
with unattested
substitution.

The words in this exception "shall not be apparent" seem to mean "apparent on an inspection of the instrument itself;" and not "capable of being made apparent by extrinsic evidence." And consequently it has been held that the Court is not at liberty to resort to evidence *aliunde*; e.g. to refer to a draft copy or to the instructions for the Will (*d*). It was the intention of the Legislature in this respect, that if a testator shall take such pains to obliterate certain passages in his Will, and shall so effectually accomplish his purpose, that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid, as if done according to the stricter forms mentioned in the Act of Parliament (*e*).

And in the earlier view taken by the Prerogative Court of this clause, it was considered as a consequence of this construction, that in a case where a legacy was given, and the amount was afterwards obliterated by the testator and another sum written by him over the obliteration, by way of substitution, but without the attestation required by the Act, although the alteration would be wholly ineffectual, and the legacy would be pronounced for as originally given, should the Will continue legible in this respect (*f*), yet if the obliteration should be such, that it could not be made out upon inspection of the Will what was the amount of the sum originally given, the legacy would be lost altogether, because the unattested substitution was not a valid alteration, and the original bequest was revoked by the obliteration which had rendered it illegible (*g*).

It was suggested, in a former edition of this Treatise, that cases of this sort might admit of the application of the doc-

which may be offered at the hearing. *Townley v. Watson*, 3 Curt. 739.

(*d*) *Townley v. Watson*, 3 Curt. 761.

(*e*) *Ib.*

(*f*) In the goods of *Beaver*, 2 Curt. 369.

(*g*) In the goods of *Rippen*, 2 Curt. 332. See also In the goods of *Brooke*, *Ibid.* 343. In the goods of *Livock*, 1 Curt. 906.

Ch. III. § 1.]

trine of dependence settled, that words, intending sum from that is not effectual and evidence were (*i*).

The statute the revocation of revoking the same unnecessary, in same effect at the done without the It is clear that Where there is testator who after that it had been mind is on the p

All questions in the Ecclesiastical

(*h*) See *post*, p. 15. See *Brooke v. Kent*, 334.

(*i*) *Soar v. Dolman*, *Townley v. Watson*. In the goods of *Bed*, Cas. 188. In the goods of *Sw. & Tr.* 536. *Parr*, 29 L. J., P. M. the goods of *Horsford*, D. 211. In the goods of *wood* [1892] P. 7. of dependent relations applies to a case which had so entirely erased of a legatee that it apparent, and had another name for it. of *McCabe*, L. R. 3. (*k*) *Clarkson v. C* & Tr. 497. In the goods

trine of dependent relative revocations (*h*), and it is now settled, that where a testator entirely erases the original words, intending to revoke a legacy by substituting a different sum from that originally given, and such substituted legacy is not effectually given, the original legacy is not revoked, and evidence *aliunde* is admissible to show what the words were (*i*).

Case when evidence *aliunde* is admissible.

The statute provides (s. 20) that the acts prescribed for the revocation of Wills must be done "with the intention of revoking the same." This enactment appears to have been unnecessary, inasmuch as the law was fully established to the same effect at the time of the passing of the Act. The act done without the intention to revoke is wholly ineffectual (*k*). It is clear that an insane person cannot have any intention.

The acts prescribed for revocation must be done *animo revocandi*.

Where there is proof that the Will was duly executed by a testator who afterwards became insane, the *onus* of showing that it had been mutilated by the testator when of sound mind is on the party alleging the revocation (*l*).

Mutilation by testator who has become insane.

All questions of revocation of Wills have ever been regarded in the Ecclesiastical Courts as questions, to some degree, of

(*h*) See *post*, p. 126, *et seq.* And see *Brooke v. Kent*, 3 Moo. P. C. 334.

(*i*) *Soar v. Dolman*, 3 Curt. 121. *Townley v. Watson*, *ibid.* 769. See in the goods of Bedford, 5 Notes of Cas. 188. In the goods of Harris, 1 Sw. & Tr. 536. In the goods of Parr, 29 L. J., P. M. & A. 70. In the goods of Horsford, L. R. 3 P. & D. 211. In the goods of Greenwood [1892] P. 7. The principle of dependent relative revocation applies to a case where a testator had so entirely erased the name of a legatee that it was no longer apparent, and had substituted another name for it. In the goods of McCabe, L. R. 3 P. & D. 94.

(*k*) *Clarkson v. Clarkson*, 2 Sw. & Tr. 497. In the goods of Thorn-

ton, 14 P. D. 82, where a testatrix being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be recopied, but died before she could re-execute it, it was held that probate of the codicil might be allowed.

(*l*) *Harris v. Berrall*, 1 Sw. & Tr. 153. See *ante*, p. 36. *Sprigge v. Sprigge*, L. R. 1 P. & D. 608. *Benson v. Benson*, L. R. 2 P. & D. 172, 176. Where a person when suffering from *delirium tremens* tore up his Will, and on his recovery said that he was mad to do it, the Court held that there was no revocation. *Brunt v. Brunt*, L. R. 3 P. & D. 37.

Presumption of law as to acts of cancellation and obliteration.

Dependent relative revocations :

cancellation dependent upon the efficacy of another act.

intention, and every fact of revocation may in some sort be said to be equivocal (*m*) : But cancelling and obliterating have always been considered peculiarly as equivocal acts, which, in order to operate a revocation, must be done with intention to revoke. The presumption of law, *primâ facie*, is that such acts are done *animo revocandi* (*n*).

But this presumption may be repelled by evidence, showing that the *animus* did not exist.—As if a man was to throw ink upon his Will instead of sand, though it might be a complete defacing of the instrument, it would be no revocation: or suppose a man, having two Wills of different dates by him, should direct the former to be cancelled, and, through mistake, the person directed should cancel the latter, such an act would be no revocation of the latter Will (*o*).

This principle, that the effect of the obliteration, cancelling, &c., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not.

Thus, in *Onions v. Tyrer* (*p*), a man made a second Will, to the use of the same person to whom he had devised the land by the first Will, with a variation only in the name of one of the trustees: but which second Will was not good, because not duly attested according to the Statute of Frauds: After so executing the second Will, he cancelled the first by tearing off the seal: One question was whether the cancelling of the former Will was a revocation thereof within the Statute of Frauds and Perjuries: And it was held, that it was not; because there was no self-substituting independent

(*m*) *Smith v. Cunningham*, 1 Add. 455.

(*n*) *Rickards v. Mumford*, 2 Phillim. 28. In the goods of Lewis, 27 L. J., P. M. & A. 31.

(*o*) *Onions v. Tyrer*, 1 P. Wms.

345, in Lord Cowper's judgment. *Burtenshaw v. Gilbert*, Cowp. 52, in Lord Mansfield's judgment. 1 Saund. 280, *b. c.* note to Duppa v. Mayo.

(*p*) 2 Vern. 742.

act, but done to second Will: I Will had actual to tear that, as effectually revoke tearing the first the Statute of tearing or cancel when he intended and it was insured case, and the consequence of second Will, the first, but it and unrevoked (recognized by *L. Gilbert* (*r*); by and by Sir John So in the case having given ins a properly executed made according draft, tore the seal that his new Will lands; this was *landi*, and therefore

Again in *Hya* to the Statute duplicate, and of the executor's death, made se

(*q*) It would have been if the latter Will was in favour of another former: See Sir judgment in *Ex p. Ilchester*, 7 Ves. 31.

(*r*) Cowp. 52.

act, but done to accompany, or in way of affirmation of the second Will: It was done from an opinion that the second Will had actually revoked the first, which induced the testator to tear that, as of no use: Therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for, though a man might, by the Statute of Frauds, as effectually destroy his Will by tearing or cancelling it, as by making a second Will, yet, when he intended to revoke the first Will by the second, and it was insufficient for that purpose, as in the principal case, and the tearing and cancelling the first was only in consequence of his opinion that he thereby made good the second Will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked (q). And the principle of this decision was recognized by Lord Mansfield in the case of *Burtenshaw v. Gilbert* (r); by Lord Ellenborough in *Perrot v. Perrot* (s); and by Sir John Nicholl in *Lord John Thynne v. Stanhope* (t). So in the case of *Hyde v. Hyde* (u), where the testator, having given instructions for some immaterial alterations in a properly executed Will, read over a draft of a new Will made according to such instructions, and having signed such draft, tore the seals from his old Will, under the impression that his new Will was completely executed so as to pass lands; this was held to have been done *sine animo cancellandi*, and therefore to be no revocation of the original Will.

Again in *Hyde v. Mason* (x) the testator duly, according to the Statute of Frauds, made and executed his Will in duplicate, and one of the duplicates was delivered to one of the executors.—The testator, about three weeks before his death, made several alterations and obliterations with his

(q) It would have made no difference if the latter Will had been in favour of another person from the former: See Sir Wm. Grant's judgment in *Ex parte the Earl of Ilchester*, 7 Ves. 379.

(r) Cowp. 52.

(s) 14 East, 440.

(t) 1 Add. 53.

(u) 1 Eq. Cas. Abr. 409.

(x) Vin. Abr. Devise (R. 2), pl. 17, S. C. *nomine Limbery v. Mason*, Com. Rep. 451.

own hand, in the duplicate remaining in his own custody, making a new devise of his real estate, and a new residuary legatee, and a new executor, entirely striking out the names of the first devisees, residuary legatees, and executors, and altered several of the former legacies, and inserted or interlined new legacies. And soon after he wrote another Will with his own hand, agreeable in great measure, but not altogether, to the Will or duplicate so altered, with the conclusion in these words: "In witness whereof I the said testator have to each sheet set my hand, and to the top where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date this day of 1790." But there was no signing or fixing together. The testator soon after began to write another will, word for word with the last, as far as it went, but proceeded no farther than devising his lands. The testator lived six days after, and was in good health, and might have finished and executed both or either of the later Wills if he had thought fit. The testator never sent to or called upon the executor for the duplicate of the first Will in his hands, though the executor lived in London, where the testator also resided. After the death of the testator all the testamentary papers or schedules were found lying all in loose and separate papers, upon a table in his closet, not signed or executed, and the duplicate of the first Will was found on the same table, altered and obliterated (*ut supra*) with his name and seal thereto, whole and uncanceled. In the Prerogative Court sentence was given for the duplicate of the first Will in the executor's hands: and upon appeal to the Delegates the sentence was confirmed by Lord Raymond, Mr. Justice Probyn, Dr. Tyndall, and Dr. Brampton. A commission of review was afterwards applied for and obtained: and after further hearing, &c., before the commissioners of review, the former sentence of the Prerogative Court was again affirmed by all the Delegates, except Dr. Pinfold, *viz.*, by Reynolds, C.B., Page, J., and Comyns, B., and two doctors of the civil law, chiefly on the

reason that the alterations and additions to the first Will, he applied to the executor, he never perfected the duplicate for the duplicate presumption of the first Will till he perfected the second.

In the case of *Wright v. Wright*, 1812, made his Will in 1812, made his Will to his wife for life, and to his wife for life after the death of his wife, upon certain trusts, and interlineations and alterations, and he regarded his real estate as his wife for her widowhood. The original Will, of Nov. 1816, was republished, or re-executed, and the testator caused a duplicate to be signed, attested, and sealed. The Court observed, under such circumstances, the duplicate were inoperative, as it originally stood. The Court observed: "The duplicate of the second Will was signed at the same time; and the cancelling of the duplicate looked upon as null." In a case in which the testator, in pencil, altered a Will, and approved of it with his own hand, in order that another Will might be made, which was prevented.

Ch. III. § 1.] *By Obliteration, Alteration, &c.*

reason that the testator did not intend an intestacy; and by the alterations and obliterations in his own duplicate of the first Will, he appeared only to design a new Will, *which, as he never perfected, the first ought to stand*; and his not calling for the duplicate in the executor's hands strengthened the presumption of his intent, not absolutely to destroy his first Will till he perfected another, which he never did.

In the case of *Winsor v. Pratt (y)*, the testator, in July, 1812, made his Will, by which he devised certain real estates to his wife for life, and on her death to her mother, and on the death of his wife and her mother to his executors, in fee upon certain trusts. In November, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was, to confine the first devise to his wife for her widowhood, and to strike out the devise to her mother. The original date was struck out, and the day of Nov. 1816, was substituted. The Will was never re-signed, republished, or re-attested, but in the following month the testator caused a fair copy to be made, and added one interlineation not affecting his real estate, but the copy was never signed, attested, or published: and in Dec. 1816, the testator died. The Court of Common Pleas were of opinion, that, under such circumstances, the interlineations and obliterations were inoperative, and that there was no revocation of the Will as it originally stood: And Dallas, C.J., in giving his judgment, observed: "The effect of cancelling depends upon the validity of the second Will, and ought to be taken as one act done at the same time; so that if the second Will is not valid, the cancelling of the first, being dependent thereon, ought to be looked upon as null and inoperative."

In a case in the Prerogative Court, an executor, having, in pencil, altered a Will (by the direction of the testator, who approved of it when so altered), and then cancelled it, only in order that another might be drawn up, the preparation of which was prevented by the death of the testator, Sir John

(v) 2 Brod. & Bing. 650. S. C. 5 Moore, 484.

Nicholl held, that such cancellation, being preparatory to the deceased making a new Will, and conditional only, was not a revocation (2).

Cancellation
made under a
mistake of
law.

Cancellation, under the influence of a mistake in point of law, seems to be equally inoperative to revoke, as if made under a mistake of fact. "If a man," said Lord Ellenborough, in the case of *Perrott v. Perrott* (a), "cancel his Will under a mistake in point of fact, that he has completed another, when he really has not, as was the case in *Hyde v. Hyde*, the cancellation is void: and if he cancel it, under a mistake in law, that a second Will (complete as to the execution) operates upon the property contained in the first, when from some clerical rule it really does not; shall this be deemed a valid cancellation?" (b).

General
principle of
the cases.

The general principle of the above cases was laid down by Lord Alvanley in *Ex parte Lord Ilchester* (c), as completely established, that, where it is evident that the testator, though

(2) In the goods of Applebee, 1 Hagg. 143. See also In the goods of De Bode, 5 Notes of Cas. 189. *Accord.* In the goods of Eeles, 2 Sw. & Tr. 600. In these cases the parties interested consented. See also for cases where the revocation was held to be absolute and not dependent, In the goods of Mitcheson, 32 L. J., P. M. & A. 202. In the goods of Gentry, L. R. 3 P. & D. 80. *Eckersley v. Platt*, L. R. 1 P. & D. 281. For further cases where the revocation was held to be dependent, see *Short v. Smith*, 4 East, 419. *Kirke v. Kirke*, 4 Russ. Ch. C. 435. *Locke v. James*, 11 M. & W. 901. In the goods of Middleton, 3 Sw. & Tr. 583. *Dancer v. Crabb*, L. R. 3 P. & D. 98. *Powell v. Powell*, L. R. 1 P. & D. 209, questioning *Dickinson v. Swatman*, 30 L. J., P. & M. 84.

(a) 14 East, 440.

(b) So in *James v. Shrimpton*,

1 P. D. 431, the testator having duly executed a Will, subsequently married, and on the day of, and after, the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his Will; his wife predeceased him, and on his death the codicil, which had been in his possession, could not be found; declarations of the testator of a desire to adhere to his Will were proved, extending up to the latest period of his life. Sir J. Hannen held that the testator could not have intended by the destruction of the codicil to render his Will inoperative, and that the Court would therefore grant probate of the Will and of the codicil as contained in a draft from which the original was prepared. See also *Dancer v. Crabb*, L. R. 3 P. & D. 98.

(c) 7 Ves. 372.

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In the goods of C
Sw. 177. *Dickins
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Tyley, Johns. 535,
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using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation (*d*).

In connection with this principle, it has been established (as will hereafter fully appear) (*e*), that a subsequent Will made under the impulse of a mistaken notion of facts will not revoke a former one.

But where the second disposition fails for want of capacity in the legatee to take, it appears to be established (though it has been thought difficult to make a satisfactory distinction) that the revocation would be effectual (*f*).

A codicil is, *primâ facie*, dependent on the Will; and the destruction or mutilation of the Will is an implied revocation of the codicil (*g*). But Lord Penzance appears to have taken a different view of this subject, and to have held that since the passing of 1 Vict. c. 26, s. 20 (see *ante*, p. 110), the words of this statute are imperative, and, consequently, that when a testator has once executed a testamentary paper, that paper will remain in force unless revoked in the particular

A Will is not revoked by a subsequent Will made under mistake of fact.

The rule differs when the gift fails by incapacity of the legatee.

When a destruction or mutilation of the Will is a revocation of the codicil.

(*d*) See also the same rule laid down by Sir Wm. Grant in the same case, 7 Ves. 279. For other cases illustrating this rule, see *Scott v. Scott*, 1 Sw. & Tr. 258. In the goods of Cockayne, Dea. & Sw. 177. *Dickinson v. Stidolph*, 11 C. B., N. S. 341. *Williams v. Tyley, Johns*, 535, per Wood, V.C. In the goods of Middleton, 3 Sw. & Tr. 583. *Powell v. Powell*, L. R. 1 P. & D. 209. The rule applies whether the revocation is dependent upon the execution of a Will in substitution or upon the erroneous assumption of the validity of a will executed before:

Powell v. Powell, *ubi sup.*: questioning on this point, *Dickinson v. Swatman*, 30 L. J., P. & M. 84. Compare In the goods of Weston, L. R. 1 P. & D. 633, in which case Lord Penzance refused to hold that the revocation was dependent.

(*e*) *Post*, p. 146.

(*f*) *Tupper v. Tupper*, 1 Kay & J. 665. *Quinn v. Butler*, L. R. 6 Eq. 225.

(*g*) *Coppin v. Dillon*, 4 Hagg. 361. *Grimwood v. Cozens*, 2 Sw. & Tr. 364. In the goods of Dutton, 3 Sw. & Tr. 66. In the goods of Greig, L. R. 1 P. & D. 72.

manner named in this section (*h*). But it may be doubted whether the view above taken by his Lordship is correct (*i*), and whether the destruction or mutilation of the Will is not an implied revocation of the codicil by reason of the very nature of the instrument, just as the mutilation of the part of any duplicate Will in the testator's own custody is a revocation of both duplicates. And, independently of the view of Lord Penzance as to the construction of this statute, there have been cases where the codicil has appeared so independent of, and unconnected with the Will, that, under the circumstances, the codicil has been established, though the Will has been held invalid. It was regarded as a question altogether of intention. Consequently the legal presumption in this case might be repelled, namely, by showing that the testator intended the codicil to operate, notwithstanding the revocation of the Will (*k*).

Duplicate
Wills :

If a Will be executed in duplicate, and the testator

(*h*) In the goods of *Savage*, L. R. 2 P. & D. 78. *Black v. Jobling*, L. R. 1 P. & D. 685. In the goods of *Turner*, L. R. 2 P. & D. 403, followed by *Butt, J.*, in *Gardiner v. Courthope*, 12 P. D. 14.

(*i*) *Sugden v. Lord St. Leonards*, 1 P. D. 154, 206; but see *Gardiner v. Courthope*, 12 P. D. 14, in which case, however, it was not necessary for the decision that the judge (*Butt, J.*) should hold that the codicil could not be revoked by the revocation of the Will since he seems to have inferred as a fact from the preservation of the codicil that there was no intention to revoke this.

(*k*) *Barrow v. Barrow*, 2 Cas. temp. Lee, 335. *Medlycott v. Asheton*, 2 Add. 231. *Togart v. Hooper*, 1 Curt. 289. In the goods of *Halliwell*, 4 Notes of Cas. 400.

Clogstoun v. Walcott, 5 Notes of Cas. 623. In the goods of *Ellice*, 33 L. J., P. M. & A. 27. Where a Will and codicil had been in existence, and the Will is afterwards revoked, it must be shown by the party applying for probate of the codicil alone that it was intended by the deceased that it should operate separately from the Will, otherwise it will be presumed that as the Will is destroyed the codicil is also revoked: In the goods of *Greig*, L. R. 1 P. & D. 72. *Gardiner v. Courthope*, 12 P. D. 14. The question whether the deceased, by revocation of a Will, meant to revoke a codicil depends upon intention to be gathered from the circumstances of the case: In the goods of *Bleckley*, 8 P. D. 169.

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(*l*) *Boughey v.*
temp. Lee, 532. *Rickards v. Mun*
23. *Colvin v.*
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(*m*) *Swinburn*
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keeps one part himself, and deposits the other with some other person; and the testator mutilates or destroys the part in his own custody, it is a revocation of both (l). The presumption of law in such case, liable of course to be rebutted by evidence, is, that the destruction or mutilation of the one duplicate was done *animo revocandi* as to both (m).

presumption that the destruction or mutilation of one revokes the other :

And in *Pemberton v. Pemberton* (n), Lord Chancellor Erskine laid down that the same presumption holds, though in a much weaker degree, where both the instruments are in the testator's possession : And further, that in a third case, where the testator, having both duplicates in his possession, alters one, and then destroys that which he has altered, there also the same presumption holds, though weaker still (o).

Same presumption where both instruments are in testator's possession :

In another case under the old law, where a father, after having made his Will, being displeased with his son, by an interlineation of his Will, excluded him from all share in his property but one shilling, and also by a codicil made for that purpose, declared his determination to the same effect ; but afterwards being reconciled to his son, the testator

an interlineation and a codicil to the same effect ; by cancelling one, the other is cancelled :

(l) *Boughey v. Moreton*, 2 Cas. temp. Lee, 532. S. C. 3 Hagg. 191. *Rickards v. Mumford*, 2 Phillim. 23. *Colvin v. Fraser*, 2 Hagg. 266.

custody, see *Payne v. Trappes*, 1 Robert. 583, 591.

(m) Swinburne seems to have been of opinion that it lay on the party relying on the revocation to prove the *animus*, otherwise the cancellation of one duplicate would not affect the other : See Pt. 7, s. 16, pl. 4 : But the modern authorities, cited in the preceding note, have now settled that the *animus* is to be presumed, till the contrary is proved. As to the presumption, when a testator destroys a duplicate in the possession of his solicitor, and preserves that in his own

(n) 13 Ves. 310. And in that case it also appears that Lord Ellenborough and Sir James Mansfield had each, in charging juries, stated the law to this effect.

(o) It was urged by counsel in the course of the argument, that in this third case, as soon as one part has been altered, the two parts cease to be duplicates, and the altered one then becomes a new Will of the latest date, and revokes all others. See further as to the revocation of duplicates, *Roberts v. Round*, 3 Hagg. 548. *Doe v. Strickland*, 8 C. B. 724.

cancelled the codicil, by drawing his pen across it, but the interlineation was left standing in the Will; it was held by Sir W. Wynne, in the Ecclesiastical Court, and afterwards by Sir W. Grant, M.R., that the cancellation of the codicil had the effect of cancelling the interlineation (*p*).

Proof of mutilation:

If a Will in testator's custody be found mutilated, the presumption is, that he mutilated it *animo revocandi*:

if it cannot be found, the presumption is, that he destroyed it *animo revocandi*:

If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is to be presumed to have done the act (*q*); and it has already appeared that the law further presumes that he did it *animo revocandi* (*r*). So where a testator has a Will in his own custody, and that Will cannot be found after his death, the presumption is that he destroyed it himself; it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority; for that would be presuming a crime (*s*). But this presumption may be rebutted by evidence leading to the conclusion that the testator did not do that which, in the absence of evidence to the contrary, it is presumed he had done (*ss*). And this presumption holds with

(*p*) *Utterson v. Utterson*, 3 Ves. & Beam. 122.

(*q*) *Swinb.* Pt. 7, s. 16, pl. 5. *Davies v. Davies*, 1 Cas. temp. Lec. 444. *Lambell v. Lambell*, 3 Hagg. 568. In the goods of *Lewis*, 1 Sw. & Tr. 31.

(*r*) *Ante*, p. 126. 3 Hagg. 568. And the law is not different though the testator appears to have gummed the signature on again in its original place: *Bell v. Fothergill*, L. R. 2 P. & D. 148.

(*s*) *Rickards v. Mumford*, 2 Phil. 23. *Colvin v. Fraser*, 2 Hagg. 266. *Lillie v. Lillie*, 3 Hagg. 184. *Wargent v. Hellings*, 4 Hagg. 245. *Welch v. Phillips*, 1 Moo. P. C. 299. *Brown v. Brown*, 8 E. & B. 882. In the goods of *Mitcheson*, 32 L. J., P. M. & A. 202.

(*ss*) Thus this presumption may be rebutted by showing that he had no opportunity of so doing, or that it has been lost or destroyed without his privity or consent: *Lillie v. Lillie*, 3 Hagg. 184, 185. *Wargent v. Hellings*, 4 Hagg. 245, 249. Or by declarations by the testator of goodwill towards the parties benefited by the Will, or of an adherence to the Will, and the contents of the Will itself: *Patten v. Poulton*, 1 Sw. & Tr. 55. *Saunders v. Saunders*, 6 Not. of Cas. 518. *Johnson v. Lyford*, L. R. 1 P. & D. 546. *Sugden v. Lord St. Leonards*, 1 P. D. 154. Or by a consideration of the contents of the Will itself: *ibid.* p. 176. For the purpose of rebutting the presumption, declarations of the testator to

respect to duplicate, and it cannot be found, is, that he destroyed are consequent presumption be

There can be destroyed in the it may be established its having been The law is the of property by destroys it by the after the death wrongfully torn some pieces which arrived at the them (*y*). So is satisfactory evidence deceased, who

various members of to a few days before pressive of his having settled his timing that his with his attorney have been prop Whiteley v. King, 756. *Sugden v. Lord St. Leonards*, 1 P. D. 154. This does not apply to a testator became i execution and co until his death: *Sy L. R. 1 P. & D. p. 125*. Nor does it Court is satisfied by evidence that the existence at the time of the testator's death: *Finch*

respect to duplicate Wills: Hence if a Will was executed in duplicate, and the testator has the custody of one part, and it cannot be found after his death; the presumption of law is, that he destroyed it *animo revocandi*; and both parts are consequently to be considered revoked, unless such presumption be rebutted (t).

There can be no doubt, that if a Will duly executed is destroyed in the lifetime of the testator without his authority, it may be established, upon satisfactory proof being given of its having been so destroyed, and also of its contents (u). The law is the same, where a wife, having power to dispose of property by her Will, makes her Will and afterwards destroys it by the compulsion of her husband (x). So where after the death of the testator, his Will and codicil were wrongfully torn by his eldest son; the Court, by means of some pieces which were saved, and by oral evidence, having arrived at the substance of the instrument, pronounced for them (y). So in *Podmore v. Whatton* (z), where there was satisfactory evidence that the defendant (the brother of the deceased, who had taken out letters of administration) had

so where the testator has the custody of one or two duplicate Wills.

An unrevoked Will, which has been unduly mutilated or destroyed, may be established:

various members of his family down to a few days before his death expressive of his satisfaction at having settled his affairs, and intimating that his Will was left with his attorney, were held to have been properly admitted: *Whiteley v. King*, 17 C. B., N. S., 736. *Sugden v. Lord St. Leonards*, 1 P. D. 154. This presumption does not apply to a case where the testator became insane after the execution and continued insane until his death: *Sprigge v. Sprigge*, L. R. 1 P. & D. 608. See *ante*, p. 125. Nor does it arise unless the Court is satisfied by unimpeachable evidence that the Will was not in existence at the time of the testator's death: *Finch v. Finch*, L. R.

1 P. & D. 371. The evidence to rebut the presumption must be clear and satisfactory: *Eckersley v. Platt*, L. R. 1 P. & D. 281. See also *In the goods of Shaw*, 1 Sw. & Tr. 62. *Harris v. Knight*, 15 P. D. 170.

(t) *Colvin v. Fraser*, 2 Hag. 266.

(u) *Trevelyan v. Trevelyan*, 1 Phillim. 149. *Sugden v. Lord St. Leonards*, 1 P. D. 154. *Sly v. Sly*, P. D. 91. See *post*, Pt. 1. Bk. iv. Ch. II. § VII.

(x) *Williams v. Baker*, Prerog. June 1, 1839.

(y) *Foster v. Foster*, 1 Add. 462. *In the goods of Leigh* [1892], P. 82.

(z) 3 Sw. & Tr. 449.

possessed himself of the Will after the death of the testator, and had suppressed or destroyed it; Sir J. P. Wilde granted letters of administration with the draft of the Will annexed to the residuary legatee. It should be observed that the same judge, in *Wharram v. Wharram* (a), appeared to doubt (but it is submitted, without sufficient reason) (aa), whether the Courts have been justified in allowing a Will to be proved by parol evidence only, where it has been shown to be lost or destroyed, and to doubt the soundness of the doctrine laid down by the Court of Queen's Bench in *Brown v. Brown* (b), that parol evidence of the contents of a lost instrument may be received as much when it is a Will as any other. This question will be considered more fully hereafter (*post*, Pt. I. Bk. IV. Chap. II. § VII.), with the subject of the probate of lost Wills generally. So if a Will be wholly or partially mutilated or destroyed by the testator whilst of unsound mind, it will be pronounced for as it existed in its integral state, that being ascertainable (c).

So a Will mutilated by testator whilst *non compos*, may be established.

The *onus* of showing a cancellation to be the act of the testator lies on those who oppose the Will.

It must be borne in mind that the *onus* of making out that the cancellation of a Will was the act of the testator himself, lies upon those who oppose the Will. Accordingly where a holograph instrument, purporting to be a codicil, was sent anonymously by the post to one of the legatees named therein, it was admitted to probate, though partially burnt and torn across, the handwriting being satisfactorily proved and the confirmatory and adminicular proof being sufficient to satisfy the Court that it was a genuine instrument (d).

(a) *Ibid.* 301.

(aa) This submission of Sir Edward Vaughan Williams was amply justified by the decision in *Sugden v. Lord St. Leonards*, 1 P. D. 154.

(b) 8 E. & B. 876. Approved in *Sugden v. Lord St. Leonards*, 1 P.

D. 154. *Conf.* *Woodward v. Gouldstone*, 11 App. Cas. 469.

(c) *Scruby v. Fordham*, 1 Add. 74. In the goods of Brand, 3 Hagg. 754. In the goods of Shaw, 1 Curt. 905.

(d) *Hitchins v. Wood*, 2 Moore, P. C. C. 355—447.

Revocation b

"Concerning Swinburne (e), 'testaments, that testament even cautel under the can die with t newest is of for ments, the last o former.'"

It is indeed a nature of a Will property by a test any previous com though the earli later non-appear are proved by p Helyar (i), Sir C Will, with a diff law a revocation then appear (k). after the Wills second one, whic the earlier Will be found: Seco that the second revoked it: and be presumed to *animo retocandi*

(e) Pt. 7, s. 14, pl

(i) 1 Cas. temp. L

(k) See *post*, p. 15 whether the first W

SECTION II.

Revocation by a subsequent Testamentary Disposition.

"Concerning the making of a latter testament," says Swinburne (e), "so large and ample is the liberty of making testaments, that a man may, as oft as he will, make a new testament even until his last breath; neither is there any cautel under the sun to prevent this liberty: But no man can die with two testaments, and therefore the last and newest is of force; so that if there were a thousand testaments, the last of all is the best of all, and maketh void the former."

It is indeed a necessary consequence of the ambulatory nature of a Will, that the *last* testamentary disposition of property by a testator shall be operative, to the exclusion of any previous contrary or inconsistent one. And this even though the earlier will is contrary to or inconsistent with a later non-appearing will, the existence and contents of which are proved by parol evidence. Accordingly in *Helyar v. Helyar* (i), Sir G. Lee held that the execution of a second Will, with a different executor and residuary legatee, was by law a revocation of the first, though the second did not then appear (k). So in *Brown v. Brown* (l), a testator, after the Wills Act, executed a Will, and afterwards a second one, which he took away with him: After his death the earlier Will was found, but the second could not be found: Secondary evidence was given which showed that the second Will was inconsistent with the first and revoked it: and it was held that the second Will must be presumed to have been destroyed by the testator *animo revocandi* (m), and that consequently, the first Will

Last Will operative to the exclusion of prior contrary or inconsistent Will.
Prior Will revoked by subsequent non-appearing Will.

(e) Pt. 7, s. 14, pl. 1.

(i) 1 Cas. temp. Lee, 472.

(k) See *post*, p. 152, *et seq.*, as to whether the first Will would be

revived by the revocation of the second.

(l) 8 E. & B. 876.

(m) See *ante*, p. 134.

Evidence must be most clear and satisfactory.

A prior testamentary paper not revoked by a subsequent one, unless they be inconsistent:

having been revoked by it, the deceased died intestate. But where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will, not appearing, the evidence ought to be most clear and satisfactory, and if parol evidence alone be relied on, such evidence ought to be stringent and conclusive (n).

But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together: for though it be a maxim, as Swinburne says above, that "no man can die with two testaments," yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last Will of the deceased (o). And if a subsequent testamentary paper, whether in form a Will or a Codicil, be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent (p).

(n) *Cutto v. Gilbert*, 9 Moo. P. C. 131, 140, 141. See also *Hellier v. Hellier*, 9 P. D. 237.

(o) See a strong instance of this in *Masterman v. Maberly*, 2 Hagg. 235; *Sandford v. Vaughan*, 1 Phil. 39, 128; *Harley v. Bagshaw*, 2 Phil. 48. In the goods of *Graham*, 3 Sw. & Tr. 69. *Geaves v. Price*, *ibid.* 71. In the goods of *Budd*, *ibid.* 196. *Birks v. Birks*, 4 Sw. & Tr. 23, in which last case, by a blunder, clauses had been omitted in a subsequent copy made of a Will, and the copy and the original Will, having both been duly executed, were admitted to probate as together containing the Will. In the goods of *Fenwick*, L. R. 1 P. & D. 319. See also In the goods of

Nickalls, 4 Sw. & Tr. 40. In the goods of *Harris*, L. R. 2 P. & D. 83. In the goods of *Donaldson*, L. R. 3 P. & D. 45, in which cases one of the papers related to property abroad.

(p) In the goods of *Petchell*, L. R. 3 P. & D. 153, 156. *Lemage*, *Goodban*, L. R. 1 P. & D. 57. *Richards v. Queen's Proctor*, 18 Jur. 540. *Stoddart v. Grant*, 1 Macq. H. L. 163. See also *Hellier v. Hellier*, 9 P. D. 237, in which case the second and partially inconsistent Will which contained no revocatory clause was not forthcoming nor admitted to probate. In *Robinson v. Clarke*, 2 P. D. 269, it was held, in a suit where the parties have come to an arrange-

Where, however, "his last Will," disposed of a paper expressly revoked by Sir Herbert J. earlier paper was withstanding the being nothing to conjointly as his he knew of no c last Will" in wh included.

But, as was pointed out by the Privy Council in the case of a testator called the circumstance with his decision, and in his judgment seems to have the

ment under the terms of the Court is applied to the case of two testamentary instruments, that the Court provided the documents entirely inconsistent with another.

(q) 1 Robert. 264. of Cas. 103. S. C. Cas. Beav. 173. But instances found where a paper a last Will and Testament admitted to probate as to a former Will: In *Luffman*, 5 Notes of the goods of *Langhorne* Cas. 512. And see in the goods of *Holt*, 6 Notes; 2 East, 494, 506; *Ellenborough* and 1 And on the whole the Privy Council in

Where, however, a testator by a paper purporting to be "his last Will," and in which executors were appointed, disposed of a *part* only of his personal estate, and did not expressly revoke a former testamentary paper, it was held by Sir Herbert Jenner Fust, in *Plenty v. West* (q), that the earlier paper was nevertheless revoked by the later, notwithstanding the two were not wholly inconsistent; there being nothing to show that he intended them to be taken conjointly as his Will: And it was said by the judge that he knew of no case where the testator called a Will "his last Will" in which the Court has held former papers to be included.

or unless the latter be a substantive Will *sed quære*:

But, as was pointed out by the Judicial Committee of the Privy Council in *Cutto v. Gilbert* (qq), the fact that the testator called the second paper his "last will" was only one circumstance with others on which Sir H. Jenner Fust founded his decision, and not the sole ground of it, as Sir John Dodson in his judgment in *Cutto v. Gilbert*, in the Court below, seems to have thought (r).

ment under the terms of which the Court is applied to grant probate of two testamentary instruments, that the Court will do so, provided the documents are not entirely inconsistent with one another.

(q) 1 Robert. 264. S. C. 4 Notes of Cas. 103. S. C. *Coram M. R.* 10 Beav. 173. But instances may be found where a paper calling itself a last Will and Testament has been admitted to probate as an addition to a former Will: In "the goods of Luffman, 5 Notes of Cas. 183. In the goods of Langhorn, 5 Notes of Cas. 512. And see further In the goods of Holt, 6 Notes of Cas. 93, 98; 2 East, 494, 595, by Lord Ellenborough and Lawrence, J. And on the whole the decision of the Privy Council in *Cutto v. Gil-*

bert, 9 Moo. P. C. 131, *post*, p. 142, and of the Lords Justices in *Freeman v. Freeman*, 5 D. G., M. & G. 704, *post*, p. 142, together with the cases cited above, appear to render the authority of *Plenty v. West* on this point at the least doubtful. Indeed, in *Lemage v. Goodban*, L. R. 1 P. & D. 57, Sir J. P. Wilde regarded *Plenty v. West*, so far as it supports the doctrine that the use of the words "last Will" in a testamentary paper necessarily imports a revocation of all previous instruments, as overruled by *Cutto v. Gilbert* and *Stoddart v. Grant* (*ubi infra*). See In the goods of *Petchell*, L. R. 3 P. & D. 153.

(qq) 9 Moo. P. C. 131.

(r) See *Dempsey v. Lawson*, 2 P. D. 98.

effect of appointment of executors.

A paper disposing of all the estate, without making an executor, wholly revokes a prior Will, though appointing executors.

In *Plenty v. West* the judge further remarked that the appointment of executors has always been considered to effect a complete disposition. But this, as it has been since held by Sir John Dodson, is by no means conclusive of the testator's intention to constitute a substantive Will (s). Conversely, where by a testamentary paper, which was executed as a Will and not as a codicil, all the testator's property is given to a particular person, without the appointment of any executor, such paper will operate as a total revocation of a prior Will, even though an executor may have been appointed by such prior Will. For the later paper being, in fact, a Will disposing of all the property, although there is no express revocation of the former Will or of the appointment of an executor, is *ex necessitate*, a revocation of the former (t).

(s) *Richards v. Queen's Proctor*, 18 Jur. 540. *Stoddart v. Grant*, 1 Macq. H. & L. 163, 173. And where a second Will appoints a fresh executor, if the Wills are not inconsistent, probate may be granted to both the executors: In the goods of *Leese*, 2 Sw. & Tr. 442. In the goods of *Graham*, 3 Sw. & Tr. 69. *Geaves v. Price*, 3 Sw. & Tr. 71. In the goods of *Morgan*, L. R. 1 P. & D. 323. A testator executed a Will purporting to dispose of, and in fact only disposing of property in Tasmania and appointed thereby executors resident in Tasmania. He subsequently executed another Will, disposing of his property in England, and thereby ratified and confirmed his Will relating to the property in Tasmania. In this last Will he appointed three executors distinct from those named in the earlier Will, and the Court ordered probate to issue of both papers as together containing the

Will of the testator. In the goods of *Harris*, L. R. 2 P. & D. 83. Where a second Will appoints no fresh executor probate of both Wills may be granted to the executor named in the first Will. In the goods of *Griffith*, L. R. 2 P. & D. 457.

(t) *Henfrey v. Henfrey*, 2 Curt. 468: affirmed in the Privy Council, 4 Moore, P. C. C. 29. Where a testator made two Wills, the first in England according to English law, by which he disposed of all his realty and personality, and appointed an executor; the second in Italy according to Italian law, by which he appointed his wife "universal heiress;" and this Will contained a revocatory clause in the following terms: "I enjoin, revoke, and annul every other act or last Will which I may have made." The Court held that the Italian Will revoked the disposition of personality and the appointment of executor contained in the

It may here be seen that a Will with a revocation, if there is any paper which it was not the intention to revoke.

Upon the same principle, Courts of Common Law will not revoke a Will, unless the testator has been presumed, from the facts, to have intended to revoke. If a Will has been made, and a second Will is found by a search, it is not the making of a former Will, but the contents of the second Will which are first: for the other Will is not at all, or but in part, revoked, though a Will be found, yet if it be found, the difference consisted in the fact that the first Will was not revoked.

English Will, and that the Will alone was entitled to probate. *Cottrell v. Cottrell*, L. R. 10 Q. B. 307.

(u) A codicil which revokes and makes void all previous dispositions in the Will, and appoints executors, in direct terms revokes the Will. If the Will does not contain a clause for the legal operation of a codicil, it is to confirm the will, to which it does not revoke. In *Howard*, L. R. 1 P. & D. 323. To the same effect, *Dent v. Dent*, 3 Phil. 575, and *Glads v. Glads*, 2 Curt. 650 decided under the Wills Act.

(v) *Hitchins v. Bass*

It may here be observed, that a Will of a date prior to a Will with a revocatory clause, may be admitted to probate, if there is any part of it which the Court is satisfied that it was not the intention of the testator to revoke (*u*).

Effect of express revocatory clause in subsequent Will.

Upon the same principles it has been decided, in the Courts of Common Law, that a subsequent Will is no revocation, unless the contents of it are known: and it is not to be presumed, from the mere circumstance of another Will having been made, that it revoked the former. As where it was found by a special verdict that the testator after the making of a former Will made *another* Will in writing, but what the contents and purport were the jury did not know: the second Will was holden not to be a revocation of the first: for the other Will might concern other lands, or no lands at all, or be a confirmation of the former (*x*). And though a Will be expressly found to be different from a former, yet if it be declared that it is not known in what that difference consisted, it will be no revocation in law thereof. Thus where it was found by a special verdict (*y*) that the

Mere fact of a later Will existing will not operate a revocation, at least in the Common Law Courts:

though it be expressly found to be different from a former Will, if the particulars be unknown:

English Will, and that the Italian Will alone was entitled to probate. *Cottrell v. Cottrell*, L. R. 2 P. & D.

(u) A codicil which absolutely revokes and makes void all bequests and dispositions in a Will and nominates executors, but does not in direct terms revoke the appointment of executors and guardians in the Will does not revoke the Will; for the legal operation of a codicil is to confirm such parts of the will, to which it refers, as it does not revoke. In the goods of *Howard*, L. R. 1 P. & D. 636. See also the same effect, *Denny v. Barton*, 2 Phil. 675, and *Gladstone v. Tempest*, 2 Curt. 650 decided before the Wills Act.

(x) *Hitchins v. Bassett*, 3 Mod.

203, affirmed in the House of Lords, *Show. Cas. Parl.* 146. "Hence it seems to follow," says Mr. Serj. Williams, in his note to *Duppa v. Mayo*, 1 Saund. 279 *h*, "that what Lord Hale is said to have laid down in a former case upon the same Will (*Seymour v. Nosworthy*, Hard. 376), namely, that 'a second substantive independent Will, though it does not by express words import a revocation of a former Will, or pass any land, amounts in law to a revocation,' is either not correctly reported, or if it be, is overruled by *Hitchins v. Bassett*."

(y) *Goodright v. Harwood*, 3 Wils. 497, affirmed in the House of Lords, 7 Bro. B. C. 344. 1 Saund. 279 *h*.

testator did make and duly publish another Will in writing in the presence of three subscribing witnesses who duly attested the same; that the disposition made by the testator by the second Will *was different* from the disposition in the former Will, but in what particular was unknown to the jury; but they did not find that the testator cancelled the second Will, or that the devisee under the first Will destroyed the same, but what was become of the second Will the jury could not tell: it was adjudged in the King's Bench, on error, reversing the judgment of C. B. to the contrary, that the second Will was no revocation of the first; and the judgment of the Court of King's Bench was affirmed in the House of Lords (2).

a later Will, of which nothing is known but that it was headed "last Will," is no revocation.

In *Cutto v. Gilbert* (a), Sir John Dodson, in the Ecclesiastical Court declined to recognize these doctrines of the Common Law: In that case a testator, having duly executed his Will, subsequently executed another testamentary paper, which was not found at his death, and the contents of which were unknown, save that it was headed "last Will;" and that learned Judge, held that the former Will was revoked by the execution of the latter, being of opinion that the execution of a Will of personalty amounts to a revocation of a former Will, whether the contents of the later Will are known or not, provided there be, in substance and effect, revocatory words. But *this decision was reversed in the Privy Council*; their lordships being of opinion that the words, "this is my last Will," did not import that the paper contained a different disposition of the property; and that the mere fact of so calling it did not render it a revocatory instrument (b). Again, in *Freeman v. Freeman* (c), Lord Justice Knight Bruce said, that whatever might be the view of the Ecclesiastical Courts, he did not think a temporal Court bound to say that when a man in an instrument, containing temporary dispositions by him describes it as his last Will and Testament, and other-

(2) See also *Dickinson v. Stidolph*, 11 C. B., N. S. 357.

(a) 18 Jur. 560.

(b) 9 Moo. P. C. 131.

(c) 5 De G., M. & G. 704.

(d) 2 P. D.

wise calls it his meaning wholly to made by him extend not extend. And a expression, "this is operate as a revoc that effect, at all ov

In the case of *D* in reviewing the o and the other cases becomes necessary t of the inconsistency will have the effect vestigation the Co construction upon t The intention of th to be ascertained by which it was used, testator the subst must be regarded. the testator in the to dispose of his p which he disposed document will be re lare the later Will d matter of the earlie West. There the C it was the intention stand alone, althou sonal estate, and th it revoked the ear bert (e), merely dec executed an instru contents of which a tion of a previous

wise calls it his Will, he is to be taken *primâ facie* as meaning wholly to annul any former testamentary instrument made by him extending to matters to which the latter does not extend. And accordingly the Lord Justices held that the expression, "this is my last Will and Testament," does not operate as a revocation of a former Will, without words to that effect, at all events as regards real estate.

In the case of *Dempsey v. Lawson* (d), Sir James Hannen, in reviewing the cases of *Plenty v. West*, *Cutto v. Gilbert*, and the other cases since decided, in his judgment said, "it becomes necessary to consider minutely the nature and extent of the inconsistency of a later testamentary instrument which will have the effect of revoking an earlier Will. In this investigation the Court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used, but in seeking the true meaning of the testator the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later Will does not completely cover the whole subject matter of the earlier. This is what was decided in *Plenty v. West*. There the Court held upon all the facts before it that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and therefore that in effect, though not in terms, it revoked the earlier Will. . . . The case of *Cutto v. Gilbert* (e), merely decides that the bare fact of a testator having executed an instrument as his last Will and Testament the contents of which are unknown, does not operate as a revocation of a previous Will, and this seems very obvious, for the

General rule deducible from cases.

(d) 2 P. D. 98.

(e) 9 Moo. P. C. 131.

the whole (i). But if there is an express contradiction between two clauses in a Will, it is settled by law that the second part of the Will must take effect over the first part (k): but it was held by Lord Romilly, M. R., that this rule does not apply where a second bequest is made by implication (l), but it may be doubted whether this decision was well founded (m).

Clause in a Will controlled by subsequent inconsistent clause.

It may sometimes become a question, in a case where there are several codicils, or other testamentary papers, of different dates, whether the dispositions of the latter are to be considered as additional and cumulative to those of the prior, or as a substitute for, and consequently revocatory of them. And if a testator, by a codicil to his Will, should direct a certain mode of making a provision for his wife, and by another subsequent codicil should also direct a provision for her in another mode; on the face of these instruments it might be doubtful, whether by the latter codicil he intended to increase the provision made by the former, or to revoke it by substituting that contained in the latter. In such cases, the Court will admit parol evidence, in order to investigate the *animus* with which the act was done; and if upon such evidence it should appear, that the latter codicil, although containing no revocatory words, was intended by the testator as a substitute for the former, it shall be thereby revoked, though it remain uncanceled (n). However, the general principle is, that bequests are, *prima facie*, to be taken cumulatively, when they are on separate papers, unless they are revocatory of each other (o). And

Revocation of a prior disposition, by a substituted one in a later instrument.

Parol evidence admissible to investigate *animus* of act.

(i) Swinb. Pt. 7, s. 11, pl. 1. Gololph. Pt. 1, c. 19, s. 3. Phipps v. Earl of Anglesea, 7 Bro. P. C. 443. Toml. Ed.

(k) See *post*, Pt. III. Bk. III. Ch. II. § 1, 4.

(l) Kerr v. Clinton, L. R. 8 Eq. 462.

(m) See *post*, 155.

(n) Methuen v. Methuen, 2 Phil-

lim. 416. Greenough v. Martin, 2 Add. 239. Jenner v. Finch, 5 P. D. 106. See *post*, Pt. III. Bk. III. Ch. II. § VII. And as to the admissibility of parol evidence, see *post*, Pt. I. Bk. IV. Ch. II. § V.

(o) Bartholomew v. Henley, 3 Phillim. 316, by Sir John Nicholl. See *infra*, Pt. III. Bk. III. Ch. II. § VII. as to cumulative legacies.

in a case (*p*) in the Prerogative Court, it was said by Sir Herbert Jenner Fust, that, whether the case is to be governed by the old law, or by the Wills Act, parol evidence is not to be admitted, unless there is such doubt and ambiguity *on the face of the papers* as to require the aid of extrinsic evidence to explain them (*q*).

**A second Will
executed under
an erroneous
supposition
that it was a
copy of the
former Will is
no revocation.**

**Revocation of
finished Will by
subsequent un-
finished Will
under the Old
Law.**

A subsequent Will or codicil, made under the impulse of a mistaken notion of facts, will not revoke a former one.

If a man executes a Will, erroneously supposing it to be a copy of his former Will, it will be no revocation as to the parts omitted in the supposed copy, and both instruments will be admitted to probate (*r*).

As to the revocation of a finished Will by a subsequent unfinished one (if made before Jan. 1, 1838), see the former Editions of this Work, Pt. I. Bk. II. Ch. 3, § 2.

It has already appeared that a cancellation of a Will, under an erroneous assumption of facts, may not operate as a revocation (s). Upon the same principle, if a man, by a subsequent Will or codicil, make a disposition different from a former one, under a false impression, the *impulse of which is the foundation of his wish to change his former intent*, such an act will be considered only as affecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. As if one having previously devised to A., afterwards by another Will, without destroying the first, or by codicil, devise to B., stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before, and had a husband living, neither of which facts were in the devisor's knowledge (t), such devise

(p) *Thorne v. Rooke*, 2 Curt. M. & A. 90.
799. (s) *Anis.*

(q) As to what is to be regarded as such an ambiguity, see *post*, Pt. I. Bk. IV. Ch. II. § v.

(r) *Birks v. Birks*, 34 L. J., P.

(8) *Anis*, p. 131.

(t) An appointment by a Will to a husband, under circumstances of this nature, occurred in *Kennell v. Abbott*, 4 Ves. 802.

or codicil will not be made, because it depends upon what has been said, that the will is not in such cases, where the testator is not originating from the place where, although the devise is false, there seem to be no ground. Thus, where a testator has a son of his sister, and a daughter, the daughter giving as a reason for her not being proved that the testator was a Loughborough man, and that the ground that the testator was said, whether it is a matter of fact or not, is perfectly indifferent to the question of the deceased son's executors and administrators. In Peru, a nun is appointed by the Statute of Frauds to be the executor of a will appointing two executors, and the will is absolutely void. The Statute of that Will in England is not void.

(u) So where a testator died in 1849, bequeathed a fund to his son, "but in case the said son should marry or die unmarried, the said fund was to go over to the said son's daughter, the testator's daughter, who was married in 1828, and to her issue, and that the testator intended that the said daughter should marry, but that it was shown under what circumstances that he knew it. It also appeared that Charlotte's husband had not been heard of for many years. After the testator's death, his husband appeared,

or codicil will not operate as a revocation of the former Will, because it depends on a contingency which fails (*u*). It has been said, that care must be taken to distinguish between cases, where the testator acts under a false impression, originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him (*x*). But there seem to be no grounds for any such distinction. Thus, where a testator gave legacies to the grandchildren of his sister, and afterwards, by a codicil, revoked the legacies, giving as a reason, that the legatees were dead; upon its being proved that the fact of their death was not true, Lord Loughborough held, that the legacies were not revoked, on the ground that the cause of the revocation was false; and said, whether it was by misinformation or mistake was perfectly indifferent (*y*). So in a case in the Prerogative Court (*z*), the deceased supposing his Will, appointing his wife sole executrix and universal legatee for life, to be lost, made, in Peru, a nuncupative Will (not in conformity with the Statute of Frauds) with a general revocation clause, and appointing two executors, and his wife universal legatee, absolutely: The executors renounced, and she took probate of that Will in Peru: The former Will being found (of which

(*u*) So where a testator, by Will dated in 1849, bequeathed the interest of a fund to Charlotte Lee, "but in case the said Charlotte Lee should marry or die unmarried," the fund was to go over. Charlotte Lee was the maiden name of the testator's daughter, who had been married in 1828, and it was found that the testator knew of her marriage, but that it could not be shown under what circumstances he knew it. It also appeared that Charlotte's husband had, in 1849, not been heard of for many years. After the testator's death the husband appeared, and on the

death of Charlotte claimed the fund. It was held by Page Wood, V.-C., that the circumstances were sufficient to show that the testator, in 1849, believed his daughter's husband to be dead, and that he intended that no husband of hers should have the benefit of the fund; and, accordingly, that on her death it passed by the gift over: *Crosthwaite v. Dean*, L. R. 5 Eq. 245.

(*x*) 1 Powell on Dev. 525.

(*y*) *Campbell v. French*, 3 Ves. 322.

(*z*) In the goods of Moresby, 1 Hagg. 378.

fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, was granted to her: and Sir John Nicholl observed that it was unnecessary to decide the question (about which there might be some doubt), whether the Statute of Frauds would apply to the nuncupative Will made in Peru; because it appeared that the deceased did not intend to revoke the former Will; but, supposing it to be lost and being unwilling to die intestate, he made the nuncupative Will. Accordingly, in *Doe v. Evans* (a), where a testatrix by her Will devised all her estate to L. E. for life, and to his sons and daughters successively, in strict tail, and L. E. and his only son died in the lifetime of the testatrix, but he left a daughter E. E., of whose birth she knew nothing, and she thereupon made a codicil, in which she recited her former Will, and that L. E. had died without leaving any issue, and then devised over: It was held, that, as this codicil was made in ignorance of the existence of E. E., it was only a conditional revocation (b).

Distinction between cases where testator refers to a fact as having actually happened, and where he

But there does seem to be a distinction between cases where the testator refers to a fact as having actually happened, and where he merely expresses his doubt, supposition or advice of the fact. Thus in the case of the *Attorney-General v. Lloyd* (c), the testator, by his Will,

(a) 10 A. & E. 288.

(b) Some time after making the codicil, the testatrix was made acquainted with the existence of E. E., but made no further testamentary disposition: It was held, that this did not set up the codicil: for, having been once inoperative, it could only be republished according to the Statute of Frauds. In *Parker v. Nickson*, 1 De G., J. & S. 117, the words in a Will, "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property, situate in the parish of M.," were held by Lord

Westbury, to be an effectual gift to N., who was, in fact, neither heir nor next of kin of the testator. The Will concluded, "N., my second cousin, is my next of kin and heir-at-law, as my brother John is dead and has left no issue." The testator had another brother, named William, and his Lordship held, that these words must not be taken as proving that the testator was under the erroneous belief that his brother William was dead without issue.

(c) 3 Atk. 515, disapproved of by Malins, V.-C. in *Thomas v. Howell*, L. R. 18 Eq. 198, 211.

dated 8th February, personal estate, He afterwards which, after rec be good, he gave Mortmain Act t On 17th March, which were, tha devise of his lar the charity shou personal estate his personal esta to M. B. The been ill-founded been certified Hardwicke, that uses, made bef enacted in 1736 enactment, pass that the testator advised; and th knowledge; an advice, and not should come ou that he made hi a doubtful ques my death, but foundation" (e) to be stated fo Bench, and th devised to M.

(d) 2 Atk. 36.

(e) His Lordsh said, his principa case was, wheiner sition by the sec put singly upon th

dated 8th February, 1734, gave particular lands and his personal estate, to be laid out in lands, to charitable uses. He afterwards made a codicil, dated 12th July, 1736, in which, after reciting his doubt whether such devise would be good, he gave the lands to M. B. and his heirs, if by the Mortmain Act they could not pass according to his Will. On 17th March, 1737, he made another codicil, the terms of which were, that the testator, "being advised" that the devise of his lands was void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he did, by that codicil, give his personal estate to the charitable uses, and his real estate to M. B. The former part of this advice seems to have been ill-founded; for in *Ashburnham v. Bradshaw* (d), it had been certified by the opinion of all the judges, to Lord Hardwicke, that a devise of lands under a Will to charitable uses, made before the Statute of Mortmain, (which was enacted in 1736,) notwithstanding the testator survived the enactment, passed the land. But Lord Hardwicke observed, that the testator had put the devise on the fact of his being advised; and that he was so advised was a fact in his own knowledge; and he had grounded his devise upon this advice, and not upon the reality of the law, though that should come out in the event one way or another; upon that he made his determination, which he might do to quiet a doubtful question,—“I will not have this litigated after my death, but I will settle it myself, upon some certain foundation” (e). His Lordship afterwards ordered a case to be stated for the opinion of the judges of the King's Bench, and they certified that the real estate was well devised to M. B., under the second codicil. So in the

merely expresses doubt, supposition, or advice of the fact.

(d) 2 Atk. 36.

(e) His Lordship afterwards said, his principal doubt in this case was, whether the new disposition by the second codicil was put singly upon the point of law;

the testator might have been advised that his personal estate had so much increased since making the Will as to be sufficient to support the charity.

Attorney-General v. Ward (f), the testatrix, having, by her Will, given 300*l.*, to be divided among such of the children of E. D. as should be living, by a codicil gave to her brother's son "the 300*l.* designed for E. D.'s children, as I know not whether any of them are alive, and if they are well provided for:" Lord Alvanley held that this operated as a complete revocation of the legacy, though the children of E. D. were alive and claimed the legacy: The learned judge observed, that it had been argued, and with some ground, that if it had rested upon her not knowing whether they were living, there would be good reason to contend, that it fell within the case of "*Pater credens filium suum esse mortuum, alterum instituit hæredem: filio domum redeunte, hujus institutionis vis est nulla;*" (g) but she went further; that she doubted, if they were living, whether they might not be well provided for; and the Court would not inquire whether they were well provided for or not.

Will executing
a power when
revoked by sub-
sequent Will.

In *Richardson v. Barry* (h), (a case before the Wills Act) the deceased had power under a trust deed, to dispose of certain effects by a Will, attested by two witnesses: And it was held, that a Will, executed accordingly, was revoked by a subsequent Will *directly referring to the trust deed*, and containing an express revocatory clause duly executed, but attested by *one* witness only.

In *Hughes v. Turner* (i), the testatrix, possessing a power of appointment, duly by Will executed that power: By a later Will duly executed and attested according to the power, but without any recital of, or reference to, the power, she disposed of a real estate over which the power extended, bequeathed all the rest, residue and remainder of her estates and effects, real or personal, plate, &c. or other property, whether in possession, reversion, or expectancy, or held in trust for her; revoked and made void all and every other

(f) 3 Ves. 327.

(g) Cicero de Oratore, lib. 1, c.

38.

(h) 3 Hagg. 249.

(i) 4 Hagg. 52.

Will and Wills declared this on Court of Delegates former Will was together, clear, and containing her Will alone. But it is this decision was altogether clear intention of the but that the clause a clear intention argued that by question was solution of the power that the Court ordinary rules, and decreed prob

Again, in *Bre* to appoint certain to her marriage even date with her After her marriage but did not, as Subsequently she whereby she may die intestate withstanding any granted of certain the last "codicil construe them in the Ecclesiastical above-mentioned

(k) See 4 Hagg.

(l) See post, Pt. § IX.

(m) See this c

Will and Wills by her at any time theretofore made, and declared this only to be her last Will and testament: The Court of Delegates, holding that the intention to revoke the former Will was, taking all the contents of the later Will together, clear, refused probate of the two papers as together containing her Will, and granted probate of the later paper alone. But it has been understood (*k*) that the ground of this decision was, that the contents of the later Will taken altogether clearly showed a departure from the original intention of the prior one, and therefore revoked that Will, but that the clause of revocation, taken *per se*, and without a clear intention, would not have had that effect. It was argued that by refusing probate of the earlier papers, the question was shut out, whether they were not a good execution of the power (*l*). But it was holden, notwithstanding, that the Court of Probate must decide, according to its ordinary rules, whether the last paper was revocatory or not, and decreed probate accordingly in the ordinary course (*m*).

Again, in *Brenchley v. Lynn* (*n*), a woman, having a power to appoint certain property by Will, made a Will previously to her marriage in 1834, and by her marriage settlement, of even date with her Will, *covenanted not to revoke that Will*: After her marriage she executed many testamentary papers, but did not, as alleged, thereby in any way revoke the Will: Subsequently she executed "a codicil" to "her last Will," whereby she revoked her "said Will in toto," "so that I may die intestate:" And Dr. Lushington held that, notwithstanding an averment of the necessity of probate being granted of certain former testamentary papers in addition to the last "codicil," in order that the Court of Equity might construe them in reference to the covenant in the settlement, the Ecclesiastical Court was bound, by the authority of the above-mentioned case of *Hughes v. Turner*, to decree probate

(*k*) See 4 Hagg. 71.

post, Pt. I. Bk. IV. Ch. II. § IX.;

(*l*) See *post*, Pt. I. Bk. IV. Ch. II. § IX.

and also Pt. I. Bk. V. Ch. III. § VI.

(*n*) 2 Robert. 441.

(*m*) See this case again stated,

of the last testamentary paper alone: For it appeared from that case, that the duty of deciding, whether the "last codicil" was meant to revoke all the other papers, was thrown on the latter Court; and upon the facts before him it could not be doubted that it was so meant (o).

From these cases, Sir C. Cresswell in the case of *In the goods of Merritt (p)*, appears to have deduced the rule, and acted upon it, that a general clause revoking all former Wills was not sufficient to manifest an intention to revoke a Will made in execution of a power.

Question prior to Wills Act whether on the revocation of a latter Will a former uncanceled Will revived?

Difference formerly existed between doctrine of Ecclesiastical and Common Law Courts on this point.

1 Vict. c. 26, s. 22.

It was long a *vezata questio*, whether the principle of law was, that, on the revocation of a latter Will, a former uncanceled Will should revive, or not. In the Common Law Courts, it was certainly laid down as an absolute proposition, excluding all questions of intention, that the former Will should revive (q).

In the Ecclesiastical Courts, it seems that a different doctrine from that laid down in the Common Law Courts had prevailed; for it had been decided in a variety of cases, that the presumption was *against* the revival of the prior Will, and that the *onus* was thrown on the party setting it up, to rebut that presumption (r).

Now, however, with respect to Wills which are within the operation of the stat. 1 Vict. c. 26, it is enacted by s. 22 of

(o) See *In the goods of Holt*, 6 Notes of Cas. 93.

(p) 1 Sw. & Tr. 112, 116, 117. See also *In the goods of Meredith*, 29 L. J., P. M. & A. 155. *In the goods of Joys*, 30 L. J., P. M. & A. 160. But the authority of this rule may be doubted, and it would rather seem that the rule is that a general revocation of Wills does not necessarily revoke an appointment by Will, but it must be shown that it is entirely unreasonable that it should have that effect,

otherwise it will be a revocation of the appointment: *Sotheran v. Denning*, 20 C. D. 90. See also *In the goods of Eustace*, L. R. 3 P. & D. 183. *Re Kingdon*, 32 C. D. 604, which last case goes far to negative Sir C. Cresswell's rule altogether.

(q) *Goodright v. Glazier*, 4 Burr. 2512. *Harwood v. Goodright*, 1 Cowp. 91.

(r) See the different cases cited in *Moore v. Moore*, 1 Phillim. 412.

that Act, that "shall be in any than by the re-ex required by the same," and the one of prior dat though it may be death (t).

It may here be codicil which sh earlier Will, whic Will made subse

According to t express revocation cannot be or codicil execu writing declaring cuted in the man to be executed "

By sect. 84, it to any Will ma tion of which cla

(t) A subsequent voke a prior d only if it contain clause but also if it with it, e.g., if th disposes of the Henfrey v. Henfrey 20. Lemage v. Go P. & D. 57.

(t) *Brown v. Bro*

that Act, that "no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and showing an intention to revive the same," and the destruction of a second Will, itself revoking one of prior date (*s*), cannot re-instate the first Will, even though it may be in existence at the time of the testator's death (*t*).

It may here be mentioned, that it has been held, that a codicil which shows an ineffectual intention to revive an earlier Will, which was destroyed, does not thereby revoke a Will made subsequently to the destroyed Will (*u*).

A codicil referring to a Will destroyed by testator does not revoke a later Will.

SECTION III.

By express Revocation.

According to the Statute of Wills (1 Vict. c. 26, s. 20), an express revocation of a Will or other testamentary instrument cannot be effectual, unless it be contained in a Will or codicil executed as required by the Act, or in "some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed" (*x*).

Revocations after Jan. 1, 1838 :
1 Vict. c. 26, s. 20.

By sect. 34, it is enacted, that "this Act shall not extend to any Will made before January 1, 1838 : " The construction of which clause has been understood to be, with reference

(*s*) A subsequent Will may revoke a prior disposition, not only if it contains a revocatory clause but also if it is inconsistent with it, *e.g.*, if the second Will disposes of the whole estate : *Henfrey v. Henfrey*, 4 Moo. P. C. 29. *Lemage v. Goodban*, L. R. 1 P. & D. 57.

(*t*) *Brown v. Brown*, 8 E. & B.

876. See also *In the goods of Brown*, 1 Sw. & Tr. 32. *Dickinson v. Swatman*, 30 L. J., P. & M. 84. *Sotheran v. Denning*, 20 C. D. 99.

(*u*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342. See *post*, Pt. I. Bk. II. Ch. IV. § II.

(*x*) See this section *verbatim*, *ante*, p. 110.

Declaration of intention to revoke within sect. 20 of Wills Act.

To revoke a clear devise, the intention to revoke must be as clear as the devise.

to the subject of the present inquiry, that the statute shall not extend to any act of revocation done with respect to a Will before January 1, 1838 (*y*).

Where a testatrix devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them to other trusts; it was held by Romilly, M. R., that the deed was not a writing declaring an "intention to revoke" within the 20th section of the Statute of Wills. Such a declaration need not be in terms, *i.e.*, "I do declare that I intend to revoke my Will," but must be in equivalent terms amounting to that (*z*).

In the case of *Doe v. Hicks* (*a*), it was stated by Tindal, C. J., in delivering the opinion of the judges in the House of Lords, that the principle on which that opinion proceeded was, that where a devise in a Will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise (*b*). And the law thus laid down has been recognized and acted upon as an established rule in numerous subsequent cases (*c*).

(*y*) *Hobbs v. Knight*, *ante*, p. 112. As to the express revocation of Wills prior to the above date, see the former editions of this work, Pt. I. Bk. II. Ch. III. § III.

(*z*) *Ford v. De Pontes*, 30 Beav. 572. And where the testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by himself and attested by two witnesses "we are witnesses of the erasure of the above," it was held that the codicil was revoked, for the words above mentioned were "a writing declaring an intention to revoke" within the above section: In the goods of Gosling, 11 P. D. 79. Where a testator sent

a letter signed by himself and attested by two witnesses, desiring the destruction of his will, the letter was held to revoke the will: In the goods of Duranee, L. R. 2 P. & D. 406.

(*a*) 8 Bing. 479.

(*b*) See *Accord*. *Cleobury v. Beckett*, 14 Beav. 587, per Romilly, M. R. *Williams v. Evans*, 1 E. & B. 739. *Kermode v. Macdonald*, L. R. 1 Eq. 457, 3 Ch. 584.

(*c*) *Patch v. Graves*, 3 Drew. 348, 376. *Robertson v. Powell*, 2 Hurl. & C. 762. *Butler v. Greenwood*, 22 Beav. 303. *Norman v. Kynaston*, 29 Beav. 96. S. C. 3 De G., F. & J. 29. *Molynaux v. Rowe*, 8 De G., M. & G. 368.

Indeed, it may be said, that a clear intention, that a clear words unless they in applying this rule indicate the testator's reasonable certainty are to institute a declaration of revocation (*e*).

It may be deduced from the authorities which have been cited (with respect to the efficacy of and of all former Wills for a revocation, with respect to another subsequent Will).

Generally speaking, a revocatory clause, it operates. But there is no doubt that probate may be granted of a Will, provided the intention of the testator is the subject of the Will.

A codicil, which the testator has executed in the execution of an intention with, and does not

(*d*) *Kiver v. Oldfield*, 1 J. 30.

(*e*) *Randfield v. Randall*, of L. 225, 235, 236. *Campbell & Wensley*, the latter clause prevails over the two clauses are irreconcilable, p. 145, and 146. Bk. III. Ch. II. § 1, 4.

Indeed, it may be stated generally as a canon of construction, that a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention (*d*). But in applying this rule it is sufficient that the subsequent words indicate the testator's intention to cut the gift down with reasonable certainty, and the rule does not mean that you are to institute a comparison between the two clauses as to lucidity (*e*).

Rule that a clear gift cannot be cut down by subsequent words unless they show equally clear intention.

Application of rule.

It may be deduced from the case of *Onions v. Tyrer* (*ee*), and the authorities which have been cited in a previous section, (with respect to the doctrine of cancellation, dependent on the efficacy of another act), that even an express revocation of all former Wills, though not wanting in any circumstance for a revocation, will not operate as such, if only subservient to another subsequent disposition, which fails (*f*).

Express revocation subservient to another disposition.

Generally speaking, where a Will contains a general revocatory clause, it operates a revocation of all prior testamentary acts. But there has already been occasion to point out (*g*), that probate may be granted of a paper of a date prior to such a Will, provided the Court is satisfied that it was not the intention of the deceased to revoke the particular legacy which is the subject of the earlier paper.

Effect of a general revocatory clause in a Will.

A codicil, which ineffectually intends to revive a prior Will which the testator has destroyed, does not operate as a revocation of an intermediate Will, if it is not inconsistent therewith, and does not show any intention to revoke (*h*).

A codicil intending to revive a destroyed Will no revocation of an intermediate Will.

(*d*) *Kiver v. Oldfield*, 4 De G. & J. 30.

(*ee*) 2 Vern. 742.

(*e*) *Randfield v. Randfield*, 8 H. of L. 225, 235, 238, by Lords Campbell & Wensleydale. As to the latter clause prevailing when two clauses are irreconcilable, see *ante*, p. 145, and *post*, Pt. III. Bk. III. Ch. II. § 1, 4.

(*f*) By Sir W. Grant, 7 Ves. 379; unless it fails by reason of the incapacity of the legatee: *Tupper v. Tupper*, 1 Kay & J. 665, *ante*, p. 131.

(*g*) *Ante*, p. 141.

(*h*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342, *post*, p. 181.

SECTION IV.

Revocation by the Republication of a Prior Will.

If a man make a Will, and at a future period republish it, such republication will revoke any Will intermediate to the original date of the prior Will and the date of its republication (i). But this subject will be more conveniently discussed hereafter, when the doctrine of republication, generally, is considered (k).

SECTION V.

Revocation by Marriage or other change of circumstances, and therewith of Presumptive or Implied Revocation.

Presumed and implied revocation.

1 Vict. c. 26, s. 19: no Will after Jan. 1, 1838, to be revoked by presumption.

Contingent Will.

The different methods of *expressly* revoking a Will having been now considered, it remains to treat of presumed or implied revocation.

It is enacted by the Wills Act, (1 Vict. c. 26, s. 19) that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

The general rule has been, from the earliest periods of the Ecclesiastical law, in accordance with this enactment, that a Will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi*: such as burning, cancelling, making a new Will, or the like.

Here it may not be improper to take notice of the case of a *contingent Will*, where, whether it will eventually take place as a Will or not, depends upon the happening or not happening of a certain event. As where a person intending to go to Ireland, made his Will in these words:—"If I die before my return from my journey to Ireland, that my house and land at F., and all the appurtenances and furniture thereto belonging, be sold as soon as possible after my death, and

(i) Rogers v. Pittis, 1 Add. 38. R. 138.

Jansen v. Jansen, *ibid.* 3d. Walpole v. Lord Cholmondeley, 7 T.

(k) Post, Pt. I. Bk. II. Ch. IV. § II. p. 177. *et seq.*

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(n) 4 Hagg. 176.

(o) The following
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Ch. III. § v.] *By Republication of a Prior Will.*

thereout all my debts and funeral charges be paid. Item, 1,000*l.* to A. out of the said money arising by the said sale, and 100*l.* to B.:" The testator, after making the said Will, went to Ireland, and returned to England, lived some years afterwards and died: It was held by Lord Hardwicke that the Will was contingent, depending upon the event of the testator's returning to England, or not; and that as he did return, the Will could have no effect, but was void (l). The Courts, however, are cautious how they construe conditions of this sort. Therefore, where a testator by three letters gave certain testamentary directions, "In case I should die on my travels:" it was held, that, although he returned, and lived many years afterwards, yet as, by subsequent acts, he recognized the papers two years before his death, his return was not such a defeasance as to invalidate the disposition of his property directed by them (m). In *Burton v. Collingwood* (n), a Will written eighteen years before the testator's death, containing this passage, "Lest I die before the next sun, I make this my last Will," was admitted to probate, the Court holding the disposition not contingent; and adherence to it being shown by careful preservation (o).

(l) *Parsons v. Lanoe*, 1 Ves. Sen. 190. 1 Saund. 279, *d.* note to *Duppa v. Mayo*.

(m) *Strauss v. Schmidt*, 3 Phillim. 209. See also *Ingram v. Strong*, 2 Phillim. 294. In *Forbes v. Gordon*, 3 Phillim. 625, Sir John Nicholl said that where a paper begins, "In case of my inability to make a regular codicil to my Will, I desire the following to be taken as a codicil thereto," the Court had in many instances decided that it means no more than, "Till I make a regular Will, so long I adhere to this paper."

(n) 4 Hagg. 176.

(o) The following are cases decided since the Wills Act in which

Wills have been held to be contingent. A Will containing the words "should anything happen to me on my passage to Wales or during my stay": *Roberts v. Roberts*, 2 Sw. & Tr. 337. "Being on the eve of embarking for San Francisco, South America, or Mexico, I do hereby, in case of my decease during my absence being fully ascertained and proved, will," &c.: In the goods of *Winn*, 2 Sw. & Tr. 147. "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad I wish everything that I may be in possession

Evidence of adherence cannot establish a Will which is in terms conditional.

Since the Wills Act it is clear that no evidence of adherence can establish the Will where it is in its terms conditional, as where the Will is expressed to take effect "in case of the testator's decease during his absence on a particular voyage" (*oo*), or "should anything happen to me on my

of *at that time*, or anything appertaining to me hereafter to be divided": In the goods of Porter, L. R. 2 P. & D. 22. "In case anything should happen to me during the remainder of the voyage to Sicily and back to London": In the goods of Robinson, L. R. 2 P. & D. 171. A mariner's Will commencing "Instructions to be followed if I die at sea or abroad": *Lindsay v. Lindsay*, L. R. 2 P. & D. 459. A joint Will contrining the words "In case we should be called out of this world at one and the same time by one and the same accident": In the goods of Hugo, 2 P. D. 73. The following are cases where Wills have been held *not* to be contingent: A Will purporting to be made in the exercise of a power and on the assumption that the nominal husband of the testatrix would survive her: *Southall v. Jones*, 28 L. J., P. & M. 112. A Will containing the words "In the prospect of a long journey should God not permit me to return to my home I make this my last Will." This Will was not executed until after the return of the testator from the journey referred to: In the goods of Cawthorn, 3 Sw. & Tr. 417. A Will made in Africa and commencing "In the event of my death while serving in this horrid climate of any accident happening to me, I leave, &c.": In the goods of Thorne, 4

Sw. & Tr. 36. A Will containing the words, "In the case of any fatal accident happening to me being about to travel by railway, I hereby leave, &c.": In the goods of Dobson, L. R. 1 P. & D. 88. This case was distinguished from the case of *In the goods of Winn, ubi sup.*, as not being limited to a particular journey but referring to railway travelling generally. A Will in these words, "I, W. M., being physically weak in health have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appellina* to the floating hospital ship *Berwick Walls* in order to recruit my health, and in the event of my death occurring during such time, I do hereby will and bequeath, &c." In the goods of Martin, L. R. 1 P. & D. 380. A Will containing the words, "On leaving this station for Thargomindah and Melbourne in case of my death on the way know all men that this is a memorandum of my last Will and testament." In the goods of Mayd, 6 P. D. 17. This case is distinguished from *In the goods of Porter, ubi sup.*, as not containing the words relied on by Lord Penzance in that case, viz., "I wish everything that I may be in possession of *at that time* (*i.e.*, at the time of his death abroad) to be divided.

(*oo*) In the goods of Winn, 2 Sw. & Tr. 147.

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(p) *Roberts v. Ro* Tr. 337.

(q) In the goods & Sw. 9. In the goods 1 P. D. 429.

(r) In the goods 1 P. & D. 717.

(s) In the goods Sw. & Tr. 315, po

passage to Wales or during my stay" (p); for in such cases if the testator's parol declarations were admitted, it would be nothing less than making a Will by word of mouth; and the act of adherence cannot carry the case further than a parol declaration.

If at the time of the death of the testator it is uncertain whether the condition, on which the Will is to take effect, will or will not happen, probate will, it would seem, be granted at once though it will only determine what is to be done with the property in certain events (q).

Where at death of testator the happening of the condition is uncertain.

A Will may be made contingent on the assent of a third party: and such Will will only be admitted to probate on the happening of the contingency on which it is dependent, viz., the assent of the third party (r).

Generally a Will made contingent on an event which has become impossible at the death of the testator will not be admitted to probate, but a contingent or conditional codicil may, it should seem, operate as a republication of a Will, or to make a Will valid if it has not been duly executed, and on that ground entitled to probate (s).

Conditional codicil when admitted to probate.

Under the old law if the testator had endorsed on his Will after its execution a memorandum that it was only to take effect on the happening of a particular contingency, such an endorsement would have been in itself testamentary, and would have expressed his intentions in a legal form, so as to have given effect to them. But since the Wills Act, such a memorandum, unless it be duly executed and attested, is wholly unavailing as part of the Will, and cannot be used as evidence of the testator's intention that the Will should be contingent only (t).

Condition unavailing unless part of duly executed Will.

(p) *Roberts v. Roberts*, 1 Sw. & Tr. 337.

(q) In the goods of Cooper, Dea. & Sw. 9. In the goods of Bangham, 1 P. D. 420.

(r) In the goods of Smith, L. R. 1 P. & D. 717.

(s) In the goods of Da Silva, 2 Sw. & Tr. 315, *post*, Pt. I. Bk. II.

Ch. IV. § I. But if a Will be conditional the condition must attach to the whole document, and therefore a revocation contained therein will be subject to the happening of the contingency: In the goods of Hugo, 2 P. D. 73.

(t) *Stockwell v. Ritherdon*, 1 Robert. 661.

Mutual Wills.

Where two sisters, being then unmarried, made mutual Wills, and the Will of one of them was afterwards revoked by her marriage, it was held that the other remained unrevoked (*u*).

Implied revocation before the Wills Act.

Before the Wills Act the marriage of a testator did not work an implied revocation, but if a woman made a Will and afterwards married, the marriage alone was a revocation of the Will (*x*).

1 Vict. c. 26,
s. 18 :

every Will to
be revoked by
the marriage of
the testator or
testatrix :

But now, by the 18th section of that Statute (1 Vict. c. 26) it is enacted, "that every Will made by a man or woman shall be revoked by his or her marriage (*y*) (except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)" (*z*).

This section obviously puts to rest (with respect to Wills within its operation) all questions as to implied revocations, by marriage, and the birth of issue, by enacting positively that marriage alone shall be an absolute revocation.

But it possibly might not apply to every instance of implied revocation by a change of condition in the testator ; because it has been held, at least in the Ecclesiastical Courts, that the

(*u*) *Hinckley v. Simmons*, 4 Ves. 160.

(*x*) For a statement of the law and authorities as to Implied Revocation of Wills before the Wills Act, see the former editions of this Work : Pt. I. Bk. II. Ch. III. § v.

(*y*) Where the husband was domiciled in this country, and had been naturalized, it was held that his marriage with his deceased wife's sister was void, and did not revoke his Will under this enactment : *Mette v. Mette*, 1 Sw. & Tr. 416. But from the terms of Section 34, it would seem that this Section has no application to Wills

made before the Act. In the goods of Shirley, 2 Curt. 657.

(*z*) See *Logan v. Bell*, 1 C. B. 872. The reason for this exception is, that a revocation of the Will in a case to which the exception applies, would operate only in favour of those entitled under the settlement in default of appointment, and the new family of the testator would derive no benefit whatever from it. See In the goods of Fitzroy, 1 Sw. & Tr. 133. In the goods of McVicar, L. R. 1 P. & D. 671. In the goods of Fenwick, L. R. 1 P. & D. 319. In the goods of Russell, 15 P. D. 111.

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concurrence of marriage is not essential for the presumption of revocation in all cases.

All such cases, however, appear to be provided for by the 19th section, which enacts, that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." For although, after the passing of this statute, it was held in *Marston v. Roe d. Fox (a)*, that the revocation consequent on marriage and the birth of issue was not, in fact, grounded on "any presumption of an intention" of the testator to revoke, but took place in consequence of a rule or principle of law independently of any question of intention; yet in all cases of implied revocations in the Ecclesiastical Court the basis of the revocation has always been held to be the intention of the testator presumed from the alteration in circumstances, and consequently the 19th section of the statute will prevent such revocation in future.

s. 19:
no Will to be
revoked by pre-
sumption.

The enactments contained in these two sections lead to consequences which may be considered as somewhat harsh: for by reason of the former, a man's Will must be revoked by his marriage without the birth of children, in a case where he had no intention to revoke it, nor any testamentary duty demanding the revocation; whereas by the operation of the latter, a Will made by a married testator must stand unrevoked, notwithstanding that the subsequent birth of children unprovided for, and other concurrent circumstances, may raise a case (as in *Johnston v. Johnston (b)*) of the strongest inference that the testator did not mean to adhere to the Will.

There is another sort of implied revocation, in the nature of ademption; which arises either when the subject of the bequest is altered or parted with, or when the purpose, for which it was bequeathed, has been provided for by the testator by other means. But it will be convenient to postpone treating

Implied revo-
cation by
ademption.

(a) 8 A. & E. 14.

(b) 1 Phil. 447.

of this mode of revocation, till the subject of legacies, generally, is considered (e).

Material difference between Wills of realty and of personalty arising from the office of executor.

It may be proper, however, here to point out a material difference with respect to this species of revocation, between Wills of realty and wills of personalty, arising from the office of executor. If the whole subject of a Will of realty be adeemed, the Will is completely revoked, and is wholly ineffectual: but should the same thing happen with respect to a Will of personalty, in which an executor is appointed, the Will must still be proved, as if its dispositions had never been revoked (g).

(e) See *post*, Pt. III. Bk. III. Ch. III. P. C. C. 29, 32, *ante*, p. 140. See In the goods of Lancaster, 1 Sw.

(g) *Beard v. Beard*, 3 Atk. 72. & Tr. 464.
See *Henfrey v. Henfrey*, 4 Moore,

BY stat. 1 v. part thereof, which revived otherwise codicil executed an intention to which shall be p shall be revived thereof as shall whole thereof, shown."

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CHAPTER THE FOURTH.

OF THE REPUBLICATION OF WILLS.

By stat. 1 Vict. c. 26, s. 22, "no Will or codicil, or any part thereof, *which shall be in any manner revoked*, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, *and showing an intention to revive the same*; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

1 Vict. c. 26:
No Will re-
voked to be
revived (after
Jan. 1, 1838)
otherwise than
by re-execution
or a codicil
showing an
intention to
revive it.

SECTION I.

How a Will may be Republished or Revived.

By the law as it stood before the passing of the Wills Act, by reason of the enactments of the 5th section of the Statute of Frauds, no Will of Lands could be republished, except by re-execution in the presence of three attesting witnesses, or by a codicil duly executed according to the statute. But as that section did not apply to Wills of Personalty, such a Will might be republished, not only by an unattested codicil, or other writing, but by the mere parol acts or declarations of the testator (a). A Will of Personalty stood nearly in the same situation as a Will of Lands did before the Statute of Frauds;—it must have been in writing, by the provisions of the Statute of Wills, but no other formalities were necessary; and we find that, before the Statute of Frauds, and after the passing of the Statute of Wills, it was holden that a written

What
amounted to
a republication
by the law
before the
Wills Act.

(a) Wentw. Off. Ex. ch. 1, p. 60, 14th edit.



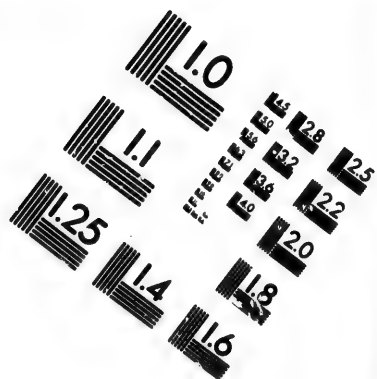
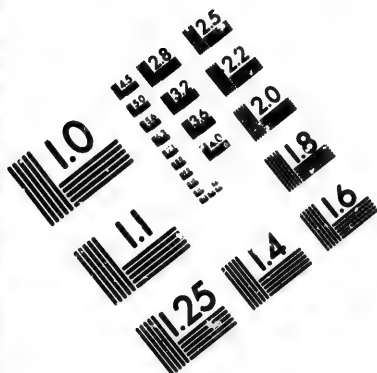
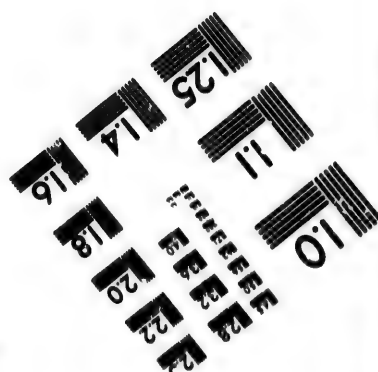
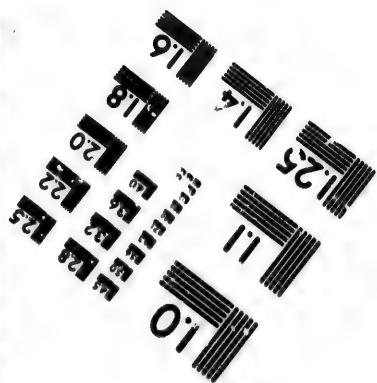
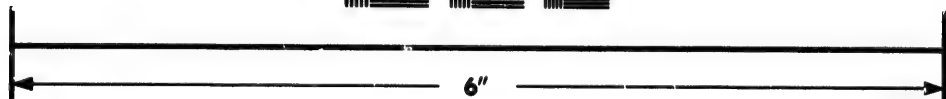
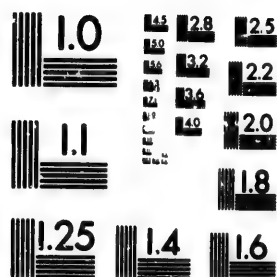


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Will of Lands might be republished by parol (*b*) ; as where, after a Will had been revoked by operation of law, the testator allowed it to be his Will, without writing it anew, it was held a republication, and that the land should pass by the Will as much as if it had never been revoked (*c*).

Republication
of a cancelled
or obliterated
Will.

Satisfactory proof of recognition, *animo republicandi*, by the testator, was sufficient republication even of a cancelled or obliterated Will, if it continued legible (*d*).

Republication
by a codicil :
in case of Wills
made before
the Will Act.

As to republication by codicil, the cases on Wills, made before the Wills Act, show that a codicil will amount to a republication of the Will to which it refers, whether the codicil be or be not annexed to the Will, or be or be not expressly confirmatory of it ; for every codicil is, in construction of law, part of a man's Will whether it be so described in such codicil or not ; and, as such, furnishes conclusive evidence of the testator's considering his Will as then existing (*e*). But although the effect of a codicil, as to republication, is by no means dependent on its being annexed to the

(*b*) Jackson v. Hurlock, Amb. 494. Beckford v. Parnecott, Cro. Eliz. 493. 1 Saund. 277, *c, d*.

(*c*) 1 Roll. Abr. 617 (Z), pl. 2.

(*d*) Wentw. Off. Ex. ch. 1, p. 65, 14th edit.

(*e*) Acherley v. Vernon, 3 Bro. P. C. 107. Potter v. Potter, 1 Ves. sen. 437. Jackson v. Hurlock, Amb. 487. Gibson v. Lord Montford, 1 Ves. sen. 485. Serocold v. Hemming, 2 Cas. t. Lee. 490. Doe v. Davy, Cowp. 158. Barnes v. Crowe, 1 Ves. 486 (overruling Att. Gen. v. Downing, Amb. 573. Pigott v. Waller, 7 Ves. 98. Goodtitle v. Meredith, 2 M. & S. 5. Hulme v. Heygate, 1 Mer. 285. Rowley v. Eyton, 2 Mer. 128. Duffield v. Elwes, 3 B. & C. 705. Guest v. Willasey, 2 Bing. 429 ; 3 Bing. 614. In the goods of Crosley, 2 Hagg. 80 ; 1 Saund. 278, *b, et seq.*,

note to Duppa v. Mayo. Williams v. Goodtitle, 10 B. & C. 895. Doe v. Walker, 12 M. & W. 591. Skinner v. Ogle, 1 Rob. 363. Doe v. Marchant, 6 M. & G. 813, 825. Dickinson v. Stidolph, 11 C. B. N. S. 341. *Re Earle's Trust*, 4 K. & J. 673. So a Will or codicil containing a devise of real estates, but not duly attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the Will or codicil. But it has been held that it must distinctly refer to it : see Doe v. Evans, 1 Cr. & M. 42. Utterton v. Robins, 1 A. & E. 423. So in *Re Smith*, 45 C. D. 632, Stirling, J., held, in reference to the Will of a married woman, which purported to dispose of property over which

Will, yet if there be a taken as a powerful to to which it : just cited wo Act, for altho revoked Will the Will, this finding, that to become a the old law.

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Will, yet if there are several Wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that it was intended as a codicil to the Will to which it is annexed, and to no other (*f*). The authorities just cited would seem to apply to Wills made since the Wills Act, for although the 22nd section requires that in the case of revoked Wills the codicil should show an intention to revive the Will, this is no more than was necessarily implied by the finding, that the codicil so referred to the Will it revived as to become a part of it, which was an essential finding under the old law.

Old cases as to republication by codicil not obsolete.

But although the general rule as to the republishing operation of a codicil is as above stated, yet in all cases of this kind the question to be considered is, whether the particular case is or is not within the general rule (*g*): for if it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted (*h*).

A codicil will not republish if a contrary intention appear on the face of it.

It remains to consider the effect of the Wills Act on the mode of republication (*i*) or revival of Wills.

she had no disposing power during the lifetime of her husband, that a codicil executed after her husband's death, which contained no reference to her Will, did not constitute a republication of that Will, and the learned judge said that the passage in the text must be read as speaking of a codicil which refers to the Will. Though a codicil confirms a Will and for certain purposes brings down the Will to the date of the codicil, it certainly does not make the Will necessarily operate as if it had been originally made at the date of the codicil: *Hopwood v. Hopwood*, 7 H. of L. 728, 740, per Lord Campbell.

(*f*) *Rogers v. Pituis*, Add. 41. *Barnes v. Crowe*, 1 Ves. 490.

(*g*) By Lord Eldon, C., in *Bowes v. Bowes*, 2 R. & P. 506.

(*h*) *Strathmore v. Bowes*, 7 T. R. 482. S. C. *sub. nom.* *Bowes v. Bowes* in Dom. Proc. 2 R. & P. 500. See also Lord Mansfield's judgment in *Heylin v. Heylin*, Cowp. 132. *Parker v. Biscoe*, 3 B. Moore, 24. *Smith v. Dearmer*, 3 Y. & J. 278. *Ashley v. Waugh*, cited in *Doe v. Walker*, 12 M. & W. 698, 601. *Money Penny v. Brington*, 2 Russ. & M. 117. *Hughes v. Turner*, 3 M. & K. 666. *Doe v. Hole*, 15 Q. B. 848. *Hughes v. Hosking*, 11 Moo. P. C. 1.

(*i*) The Real Property Com-

The only mode in which since the Wills Act a Will which has been revoked can be revived, is that pointed out by the 22nd section (a). There must be a re-execution (b), or a duly

missioners (4th Report, pp. 33, 34) intimate that since publication is no longer necessary for a Will (see sect. 13 of the stat. 1 Vict. c. 26) it will be improper to continue the expression republication. But it may be observed that this expression has always been in use, as a convenient term, with respect to Wills of personal estate, although no publication was ever necessary for their validity. And the 34th section (see *post*, p. 179) of the Act itself (as was observed by Sir H. Jenner *Fust. in Skinner v. Ogle*, 4 Notes of Cas. 78) distinguishes between a republication and a revival.

(a) A codicil reviving a revoked Will will not necessarily revive every codicil thereto. The principle is thus stated by Fry, J., in *Green v. Tribe*, 9 C. D. 231, 234: "On the one hand, where a testator in a codicil uses the word 'Will' abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the Will of the testator; and consequently where a testator by a codicil confirms in general terms 'his will' or 'his last will and testament,' the Will together with all codicils is taken to be confirmed. On the other hand, the testator may by apt words express his intention to revoke any codicil already made and to set up the original Will unaffected by any codicil." The learned Judge goes on to say that the reference to the date of the original Will is not an indication of the intention to de-

prive all instruments other than the original Will itself of any force, and cites *Crosbie v. Macdonald*, 4 Ves. 610; *Smith v. Cunningham*, 1 Add. 448; *Greenough v. Martin*, 2 Add. 239; In the goods of *de la Sausseye*, L. R. 3 P. & D. 42; *Gordon v. Lord Reay*, 5 Sim. 274; *Aaron v. Aaron*, 3 De G. & Sm. 475, as authorities for this proposition; and after pointing out that in the last two cases the codicil held to be republished was a codicil which, from defective execution, had no proper force of its own, goes on to say that the disapproval expressed by Sir G. Jessel of *Gordon v. Reay* in *Burton v. Newbery*, 1 C. D. 234, only amounted to a decision, that where recourse is had to a subsequent codicil to give vigour to an earlier one, a mere reference to the Will by its date will not operate upon the earlier and inoperative codicil so as to set it up. The two classes of cases differ essentially: in the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail: in the one class the question is, Does the later codicil revoke the earlier and operative one; in the other class you inquire, Does the later codicil set up the earlier and inoperative one: to the one class the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has

(b) See page 168.

executed codicil intention to revoke is not sufficient

no application. *Bing*, 475. *Farrer College*, L. R. 1 also *Follett v. P* 337. The same applied by Sir J. the question of codicil, referring revived a revoked Will, in the case of *Reynolds*, L. 35, in which executed a will codicil to it in November, 1871, a Will which previous testament 1872 he executed was headed, "The Will of R., &c." It concluded with the words "I revoke the Will and codicil clause contained in the Will of 1866, in the presence of the witnesses to be gathered at the time the codicil was intended to be made 1866 but not the 1871."

(b) The intention what is intended must be gathered from the evidence is not the absence of later evidence to show what the testator intended in the goods of *Steel*, 575, 576. *Wal* 3 Ves. 402.

executed codicil. There are no other means of showing an intention to revive (*bb*). Destruction of the revoking instrument is not sufficient (*c*).

no application. *Doe v. Hicks*, 8 Bing. 475. *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19. See also *Follett v. Pettman*, 23 C. D. 337. The same principles were applied by Sir J. Hannen, where the question was whether a codicil, referring to a will by date, revived a revoked codicil to that Will, in the case of *L. the goods of Reynolds*, L. R. 3 P. & D. 35, in which case the deceased executed a will in 1866 and a codicil to it in May, 1871, and in November, 1871, he executed a Will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the Will of R., dated May, 1866." It concluded with the appointment of the son as executor of the Will and codicil, and the attestation clause commenced, "Codicil to the Will of R., dated May, 1866, in the presence of," &c. It was held that the only intention to be gathered from the words of the codicil was that the testator intended to revive the Will of 1866 but not the codicil of May, 1871.

(*bb*) The intention to revive, and what is intended to be revived, must be gathered from the contents of the codicil itself, and evidence is not admissible in the absence of latent ambiguity to show what it was to which the testator intended to refer: In the goods of *Steele*, L. R. 1 P. & D. 575, 576. *Walpole v. Lord Orford*, 3 Ves. 402. In the goods of

Goodenough, 2 Sw. & Tr. 141. A codicil referring inaccurately to a Will may republish it. See *Jansen v. Jansen*, cited by Sir J. Nicholl in *Rogers v. Pittis*, 1 Add. 38. In the goods of *Houblon*, 11 Jur. N. S. 549. *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461. *Thompson v. Hempenstall*, 1 Rob. 783. A reference to a prior Will by date may be shown to be a mistake by internal evidence gathered from the contents of the codicil: In the goods of *Wilson*, L. R. 1 P. & D. 575, 582, read in the light of surrounding circumstances: In the goods of *May*, L. R. 1 P. & D. 575, 582. In the goods of *Whitman*, 34 L. J., P. & M. 17. Where a codicil, by mistake as to the date of a prior Will, refers to an earlier Will than that intended to be referred to, the codicil will not revive the earlier Will to which it so refers, and the codicil may be admitted to probate together with the later Will. In the goods of *Ince*, 2 P. D. 111. But where the codicil makes reference to the provisions of the earlier Will such earlier Will is confirmed and will revive; and the mistake cannot be corrected otherwise than by admitting the earlier Will to probate together with the codicil and the later Will. In the goods of *Stedham*, 6 P. D. 205. In the goods of *Dyke*, *ibid.* The reference need not be by date, but may be inferred from a reference in the reviving codicil to the

(*c*) See next page.

But it must be observed that the 22nd section, is confined to Wills, &c., "*which shall be in any manner revoked.*" It is obvious, however, that, inasmuch as the old doctrine of the republication of Wills by parol acts or declarations depends on the principle that the Will so recognized becomes a new Will of the date of the recognition, no such republication can take place, in respect of any Will whatever, since the statute came into operation, because no new Will can be made,

contents of the Will intended to be revived: In the goods of McCabe, 2 Sw. & Tr. 478. It is to be observed that even if a codicil refer to a Will with the intention of reviving it, and it turns out that such Will has been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival: In the goods of Steele, L. R. 1 P. & D. 575, 576. *Hale v. Tokelove*, 2 Rob. 318. *Newton v. Newton*, 5 L. T. (N. S.) 218. *Rogers v. Goodenough*, 2 Sw. & Tr. 342. When a testator refers in a codicil to a *last* Will, and there is nothing in the contents of the codicil to point to any particular Will, it must be construed to refer to the Will in legal existence as the last Will and not to a revoked Will: *Hale v. Tokelove*, *ubi sup.*: p. 326. A codicil which is expressed to take effect only in an event which does not happen republishes it should seem a Will to which it refers by date, and it is on this ground entitled to probate: In the goods of Da Silva, 2 Sw. & Tr. 315.

(b) As to what amounts to a re-execution, see *Dunn v. Dunn*, L. R. 1 P. & D. 277.

(c) *Major v. Williams*, 3 Curt. 432. The above section was much considered by Lord Penzance in

the case of *In the goods of Steele*, L. R. 1 P. & D. 575, where it was laid down by his Lordship that a codicil may, by referring in adequate terms to a revoked Will, revive that Will if it be in existence, but the codicil must "show an intention to revive the same," according to the words of the section; and in order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a Will as revoked, and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention; and that since the passing of the statute, a Will cannot be revived by mere implication. It was also laid down in the above case that references in codicils to revoked Wills by their dates were insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the Will so referred to. But the correctness of this ruling may be questioned: In the goods of *Reynolds*, L. R. 3 P. & D. 35. See In the goods of *Dennis* [1891 P. 326.

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(d) *Doc v. Walker*, 391, post, p. 178. See also 4 Notes of Cas. 74. of Wills which are ceased to be a material part of the Wills Act, even if construed, with reference to the estate and personal estate in it, to speak and to do, it had been executed before the death of the testator, unless a contrary intention appears by the Will. The above cited there was before the Wills Act, and real property interested in the publication, and the republication was important.

(e) A Will and codicil under the Wills Act, and the marriage of the testator, to be revived by a subsequent marriage after the marriage was tested, though it did not confirm or revive the Will, but referred to the last Will of me, "Will," (it not appea

unless with the prescribed formalities. Again, it is clear that no republication can now, in any case, be effected by a codicil, unless the codicil be executed according to the exigencies of the statute; because such republication depends on the codicil becoming a part of the Will; and it cannot become a part unless it be so executed. But if it be so executed, it will still amount to a republication of the Will, according to the old law, unless it appears, on the face of it, that it was not the intention of the testator to republish (d); or unless the Will has been in some manner revoked, in which case the statute further requires that the codicil should show an intention to revive the Will (e).

(d) *Doc v. Walker*, 12 M. & W. 591, post, p. 178. *Skinner v. Ogle*, 4 Notes of Cas. 74. Republication of Wills which are unrevoked has ceased to be a matter of so much importance, since now, by sect. 24 of the Wills Act, every Will is construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will. In the cases above cited there was a Will made before the Wills Act, disposing of real property intermediately acquired between the Will and republication, and the question of republication was therefore important.

(e) A Will and codicil revoked, under the Wills Act, by the marriage of the testator, were held to be revived by a codicil made after the marriage and duly attested, though it did not expressly confirm or revive any particular Will, but referred merely to "the last Will of me," and "my said Will," (it not appearing that more

than one Will of the testator was in existence): *Neate v. Pickard*, 2 Notes of Cas. 406. See also *Accord*. In the goods of *Terrible*, 1 Sw. & Tr. 140. Again, where one part of a Will in duplicate remained undestroyed in the possession of the testator, but the other part in the possession of his solicitor had been destroyed by the testator on the execution of a subsequent Will made in 1838, in terms revoking the prior Will, it was held that such prior Will was revived by a codicil, made subsequently to the second Will, though referring to the prior Will merely by date; for that such reference sufficiently showed "an intention to revive:" *Payne v. Trappes*, 1 Rob. 583. Lord Penzance, however, said that the decision proceeded upon the ground that the judge was convinced of the testator's intention, not that he felt bound by the language in the face of an opposite conviction: that there may be little beyond the reference by date to show the intention to revive, but the Court did not in *Payne v. Trappes* (ubi

By section 34,—“This Act shall not extend to any Will made before the first day of January, 1838.”

Result.

The result appears to be this: that a republication or revival by parol acts or declarations, or by an unattested codicil or other writing, according to the old law, shall be valid, if it took place before the 1st of January, 1838; but that, after the expiration of the year 1837, no republication shall be effectual unless by re-execution, according to the solemnities required by the statute of Victoria for an original Will, or by a codicil executed in the same manner, notwithstanding the Will itself may have been executed before the 1st of January, 1838 (*f*).

SECTION II.

Of the Consequences of Republication.

The Will republished is a new Will of the date of the republication;

It has long been settled law that the republication of a Will is tantamount to the making of that Will *de novo*; it brings down the Will to the date of the republishing, and makes it *speak*, as it were, *at that time*. In short the Will so republished is a new Will.

it revokes any other Will, of a date prior to that of republication:

Consequently, upon the ordinary and universal principle that, of any number of Wills, the last and newest is that in force, it revokes any Will of a date prior to that of the republication (*g*).

sup.), say that the date alone was sufficient: In the goods of Steele, L. R. 1 P. & D. 575, 578. See also Hale v. Tokelove, 2 Rob. 318, *post*, p. 181. But the physical annexation (by a piece of tape, *e.g.*) of a duly executed codicil of a later date to testamentary papers duly executed but revoked, is no ground for inferring the “intention to revive,” required by the statute. And it should seem that such intention can only be shown by the

contents of the codicil itself: Marsh v. Marsh, 1 Sw. & Tr. 528.

(*f*) Hobbs v. Knight, 1 Curt. 768, 774. De Zichy Ferraris v. Lord Hertford, 3 Curt. 468, 512. Noble v. Phelps, L. R. 2 P. & D. 282. So, conversely, a Will of lands made before January 1, 1838, and revoked, may be republished after that day by a codicil attested by two witnesses only: Andrews v. Turner, 3 Q. B. 177.

(*g*) Rogers v. Pittis, 1 Add. 38.

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But there is a great distinction between Wills and codicils as to what is revoked: for as every codicil is, in construction of law, a part of the Will, a testator by expressly referring to, and confirming the Will, will not be considered as intending to set it up against a codicil or codicils, revoking it in part. And, therefore, in a case where a testator made his Will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the Will; and by a further codicil, referring to the Will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the Will; this confirmation of the Will was held not to revive the parts of it which were altered or revoked by the former codicils; Lord Alvanley, M.R., observing, that if a man ratifies and confirms his last Will he ratifies and confirms it with every codicil that has been added to it (*h*).

distinction
between Wills
and codicils.

This proposition seems to be true, notwithstanding the fact that a later Will is not necessarily a revocation of earlier Wills, because, where such Wills are not inconsistent, the series of Wills may together constitute the last Will of the testator; for it would seem that, if a man republishes one of the earlier Wills in a series, he is either republishing a Will which is inconsistent with the later Wills in the series, or he is republishing a part of a Will constituted by the series; the exclusion of the later parts, and *quodcumque* *videt* the testamentary papers later than that republished are revoked.

(*h*) *Crobie v. MacDoul*, 4 Ves. 610: In the goods of De La Sausaye, L. R. 3 P. & D. 42. It is to be remembered that since the decision in *Cutto v. Gilbert*, 9 Moo. P. C. 131, the fact that the revoking instrument is a Will does not necessarily make it revoke prior testa-

mentary instruments. The question as to what is revoked is always a question of intention. *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19. *Green v. Tribe*, 9 C. D. 231. *Follett v. Pettman*, 23 C. D. 337. Where there are several codicils of different dates, it will always be a question to be determined from the contents of the codicils, and (at all events, in a Court of Probate) from all other circumstances of the case, whether the later are cumulative to, or substituted for, and revocatory of the former; and if upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former Will, the Court will admit parol evidence to ascertain the intention: *Methuen v. Methuen*, 2 Phil. 416. *Greenough v. Martin*, 2 Add. 239. *Thorne v.*

In *Upfill v. Marshall* (i), a Will (dated February, 1837) disposed of real and personal estate: A codicil (dated June, 1837) partly revoked the disposition of the personality: A memorandum (dated July, 1838) formally republished the Will: And it was held that parol evidence was admissible to show *quo animo* the memorandum was made; and upon that evidence, that the codicil was not revoked by the republication of the Will.

1 Vict. c. 26,
s. 22.

And now, by stat. 1 Vict. c. 26, s. 22, "when any Will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

In a case where a Will and codicil, which had been revoked, under the Wills Act, by the testator's marriage, was revived by a codicil referring to the Will, several alterations appeared on the face of the Will: And it was held by Sir H. Jenner Fust, that the codicil revived the Will as it stood at the time of republication, being of opinion that it was the intention of the deceased in the alterations to revoke the altered legacies, and that therefore he could not have intended to revive that part of the Will which he had revoked before (k).

Republication
extends the
operation of
the Will to
persons to
whom the
description is
applicable at
date of repu-
lication.

There is another consequence of a republished Will being considered as a new Will of the date of the republication, which though still important in the description of persons mentioned in the Will used to be of further importance in the description of the estate comprised in it when Wills of land spoke as from the date of the Will and not from the death, viz., that the operation of the Will is by republication extended to subjects which have arisen between its date and republication. As if one give to Sarah his wife a piece

Rooke, 2 Curt. 799. Jenner v.

Finch, 5 P. D. 106. *Ante*, p. 145.

See also *infra*, Pt. I. Bk. IV. Ch. II.

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(i) 3 Curt. 636.

(k) Neate v. Pickard, 2 Notes of
Cas. 406.

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(l) 1 Went. Off. E.
14th edition.

(m) 1 We... Off. E.
14th edition.

(n) Alford v. Earle
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of plate, or other thing, and hath no such wife at the time, but after marrieth one of that name, and then publisheth the Will again; now this shall be a good bequest (l). So if one devise goods which he hath not, if he after do purchase the same, and then say that his Will before made shall stand or be his Will, it shall be a good Will and bequest: for this in effect is a new making (m). So where a man had devised a lease to his daughter, and afterwards renewed the lease, which was held to amount to a revocation by ademption of the lease originally bequeathed; it was holden, that the renewed lease passed by means of a codicil made after the renewal, which, although it took no notice of the lease, operated as a republication of the Will (n). And so far has the doctrine that a republication gives words, used in the original Will, the same force and effect as they would have had if first written at the time of the republication, been extended, that it has been considered that a bequest may extend to *any person* to whom the description is applicable at the period of republication, though not originally intended (o).

But it has been held that in the case of a married woman, whose Will is only the exercise of a power, her republication of it by a codicil made after her husband's death has not necessarily the effect of extending the operation of the Will so as to make it include that which was not included in the power given to her to make the Will: Thus, where a married woman, by her Will dated in 1824, and made in exercise of a power, duly appointed and devised certain hereditaments therein specified, and also all other the hereditaments, if any such there were, which she had any power to appoint and devise, and afterwards, when a widow, in the

Secus, as to a Will in the exercise of a Power, *semble*:

(l) 1 Went. Off. Ex. c. 1, p. 62, 14th edition.

(m) 1 Went. Off. Ex. c. 1, p. 62, 14th edition.

(n) Alford v. Earle, 2 Vern. 208. S. C. cited under the name of Al-

ford v. Alford, 3 P. Wms. 168. See also Coppin v. Fernyhough, 2 Bro. C. C. 291. Porter v. Smith, 16 Sim. 251.

(o) Perkins v. Micklethwaite, 1 P. Wms. 275. See *post*, p. 179.

year 1829, made a codicil, whereby she gave some legacies, but did not dispose of the residue of her estate, and she confirmed all Wills and codicils which she had theretofore made, it was held by Sir J. Romilly, that the Will, as confirmed, passed only such hereditaments as were subject to her power, and not certain other hereditaments to which she had become entitled at the date of the codicil; for that the codicil did not extend or enlarge the appointment, so as to make it a devise of that which was not contained in the power (p).

distinction
between Wills
of realty and
personalty in
this respect.

This consequence of republication was not so important with respect to personalty as it was with regard to realty, before the passing of the Wills Act (1 Vict. c. 26); because a Will of personalty, if it contained prospective words sufficiently comprehensive, would operate on the personal estate of the testator, to which those words applied, although acquired since the making of the Will, without any republication of it (q): whereas no real estate which the testator had not at the date of the Will would pass by it, however express, comprehensive, and general the words, or however manifest the intention of the testator might be (r). Consequently no after-purchased lands could pass, nor any lands which did not remain in the same condition from the date of the Will to the death of the testator, unless there were a republication, according to the solemnities required by the Statute of Frauds; for any the least alteration, or new modelling of the estate after the Will, was an actual revocation (s).

1 Vict. c. 26,
s. 3:

But now, by stat. 1 Vict. c. 26, s. 3, the power of disposing by Will executed as required by that Act is extended to all such real estate as the testator may be entitled to at the

(p) *Du Hourmelin v. Sheldon*, 19 Beav. 389.

(q) See, as to the ademption of legacies, and the revival of adeemed legacies by republication, the subsequent part of this Treatise, (Pt.

III. Bk. III. Ch. III.)

(r) 1 Saund. 277, s, note to *Duppa v. Mayo*.

(s) 1 Saund. 278, s, note to *Duppa v. Mayo*.

time of his death, he was entitled to the residue of the Will.

It should further be observed, that the same statute, construed, with reference to the estate comprised in the Will, has been executed in many cases, unless a contrary

(t) It is not at all surprising to find this "contrary" pressed in so many cases, some way quite free. It is enough if it be a fair construction adopting those rules which are usually applied in construing Wills, that the intention does accordingly, where in a Will the personal estate bequeathed, which date was commencing itself with the testator's death, the "all the estates of" now seized and possessed used the word "my" parts of his Will, came to the period at making his Will, had held that the thereby indicated intention, so as to take effect from the date of the death, and that real after the date of the pass by it.—In the argument, his Lordship admitted the word under the Act, be death if there was

time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

It should further be observed that, by the 24th section of the same statute, it is enacted, "that every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will" (i).

1 Vict. c. 26,
s. 24 :

a Will shall be construed to speak from the death of the testator, unless a contrary intention shall appear by the Will :

(i) It is not at all necessary to find this "contrary intention" expressed in so many words, or in some way quite free from doubt. It is enough if it be found, on the fair construction of the Will, adopting those rules of construction which are usually adopted in construing Wills, that the contrary intention does appear. Accordingly, where in a Will of real and personal estate *bearing a date*, which date was contrasted in the gift itself with the time of the testator's death, the testator gave "all the estates of which I am now seised and possessed," and used the word "now" in other parts of his Will, clearly alluding to the period at which he was making his Will, Lord Cottenham held that the testator had thereby indicated a contrary intention, so as to take the case out of the general rule that the Will shall be construed to speak and to take effect from the testator's death, and that real estate acquired after the date of the Will did not pass by it.—In the course of the argument, his Lordship said he admitted the word "now" would, under the Act, be the time of the death if there was no date to the

Will : *Cole v. Scott*, 1 Mac. & G. 518, 16 Sim. 259. (See the observations on this case in *Langdale v. Briggs*, 3 Sm. & G. 253, 254. 8 De G., M. & G. 437, and in *Re Ord*, 12 C. D. 22, 25.) But in a case where a testator after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, released him from "all claims in respect of the aforesaid moneys and all other moneys due from him to the testator," and by a codicil released the son from another specified debt for moneys misappropriated by the son, it was held that the "contrary intention" did not appear, and that the son was released from the repayment of the money advanced to him by the testator after the date of the codicil. *Everett v. Everett*, 7 C. D. 428. The Court sometimes refuses to find the 'contrary intention,' unless very clearly expressed, even though the bequest be specific, and even though the words used in the Will were originally or by the time of the death of the testator by reason of some change in the condition, have become somewhat inapt to

The latter of these two enactments in effect puts the case of real property on the same footing as that on which

describe the subject-matter of bequest, see *Trinder v. Trinder*, L. R. 1 Eq. 695, where a testatrix having bequeathed her shares in the Great Western Railway, and having at the date of her Will had no shares strictly speaking in the Great Western or any other company, but possessing Wilts and Somerset stock of the Great Western Railway, and also other stock which was increased between the date of her Will and her death, it was held that all the Great Western and Wilts and Somerset stock in the possession of the testatrix at her death passed under the bequest. And see the remarks of Cairns, C., in *Morrice v. Aylmer*, L. R. 10 Ch. 148, deciding that under a bequest of Railway 'shares' railway 'stock' passed. See further, as to the construction of this section: *Douglas v. Douglas*, Kay, 400. *Bullock v. Bennett*, 1 Kay & J. 315. 7 De G., M. & G. 283. *Goodlad v. Burnett*, 1 Kay & J. 341. *Jepson v. Key*, 2 Hurl. & C. 873. *Langdale v. Briggs*, 3 Sm. & G. 246. 8 De G., M. & G. 391, 437. *Re Otley Railway*, 34 L. J., Ch. 596. S. C. 11 Jur., N. S. 818. *Wagstaff v. Wagstaff*, L. R., 8 Eq. 229. *Re Ord*, 9 C. D. 667; 12 C. D. 22. *Saxton v. Saxton*, 13 C. D. 359. *Re Russell*, 19 C. D. 432. *Re Portal & Lamb*, 27 C. D. 600, *reversed* 30 C. D. 50. *Re Knight*, 34 C. D. 518. *Post*, Pt. III. Bk. III. Ch. IV. § VIII. To prevent the application of the section, an intention must be shown excluding the effect given to the Will by the statute,

namely, the effect of a continuing operation during the subsequent life of the testator: By Lord Westbury, in *Thomas v. Jones*, 1 De G., J. & Sm. 83. As to whether the section is to be applied to an excepting clause, see *Hughes v. Jones*, 1 Hemm. & M. 765, 770. The fact that a will is made before a settlement creating a power will not afford ground for holding that such *contrary intention* appears by the Will as that it will not execute the power created by the settlement. *Boyes v. Cook*, 14 C. D. 53. *Airey v. Bower*, 12 App. Cas. 263. This section applies to a specific bequest of a particular thing as well as to a generic bequest. When a bequest is of that which is generic, of that which may be increased or diminished, then the Wills Act requires something more on the face of the Will for the purpose of indicating such contrary intention than it does when the Will refers to a particular thing, as "my ring" or "my horse," *Goodlad v. Burnett*, 1 Kay & J. 341. The section applies, it will be seen, as well to personal as to real estate. Even before the Wills Act was passed, the Will spoke as regards general personal estate from the death, but a very little was held to make the bequest indicate an intention to pass the specific property only which the testator might have belonging to him of the description in question at the time of making his Will. Now, however, since the Wills Act has expressly enacted that a Will shall be construed with reference to personal estate to speak and

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personal property already stood : For the general rule, as to Wills of mere personalty, established before the Wills Act

take effect as if it had been executed immediately before the testator's death, unless a contrary intention appears by the Will, some more specific indication of such "contrary intention" is required than was thought sufficient before the Wills Act : *Goodlad v. Burnett*, 1 K. & J. 341. It will be seen that a great many of the above cited cases although dealing in a sense with the question of the construction of the 24th section, depended mainly upon the question whether the description of the property contained in the Will sufficiently described the property of which the testator died possessed : for, although specific gifts are within sect. 24, so as to make the Will cover after-acquired property if the description admits of it, and a contrary intention does not appear by the Will (*Re Ord*, 12 C. D. 22, 25), yet the words of the specific devise might, from inaptness of description, exclude after-acquired property of the same kind, even though no contrary intention should appear by the Will. Thus where A. devised "my cottage and all my land at S." and A. subsequently contracted to purchase a large mansion house, it was held that, construing the Will as made immediately before the death of the testator, the words used did not sufficiently describe the big house : but that if A. had simply devised "all my land at S." then the big house would have been included. *Re Portal & Lamb*, 30 C. D. 53. A bequest, if specific under the old law, remains specific,

but is enlarged as to its effect by the operation of the enactment, not that the nature of the bequest is altered at all (*Turner, L.J.*, in *Langdale v. Briggs*, 8 D. G. M. & G. 391, quoted with approval by *Jessel, M.R.*, in *Bothamley v. Sherson*, L. R. 20 Eq. 304). But *Lindley, L.J.*, in *Re Portal & Lamb ubi sup.*, expressed his opinion that this section leaves open the question whether a particular property passes by the specific or the residuary devise.

The difficulty arising from the partial inapplicability of the words of the Will to the condition or form of the subject-matter of bequest at the time of the death often arises when the testator at the date of making his Will is possessed of leasehold property, but before his death may have purchased the reversion, and the property may thus have become freehold. The construction will depend upon whether the words of description, though partially inapt, sufficiently identify the subject-matter of bequest. The clause in the statute says that the Will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death, and if there is nothing in the Will to confine its operation to the interest which the testator had at the date of the Will, the mere word which the testator adopts of describing his property does not bind him to that and nothing else. *Saxton v. Saxton*, 13 C. D. 359 ; *Cox v. Bennett*, L. R. 6 Eq. 422 ; *Miles v. Miles*, L. R. 1 Eq. 462.

passed, was, that they speak from the day of the testator's death, and are not referable to the state of the property at the time of making the Will, unless there are expressions in the Will showing it was intended to describe property with

The remarks of Malins, V.-C., in *Saxton v. Saxton* (*ubi sup.*), throw doubt on the authority of *Emuss v. Smith*, 2 De G. & Sm. 722 an early case in which it was held that a bequest of a leasehold garden, the reversion of which was afterwards purchased, was deemed by the subsequent conveyance of the fee to the testator, and formed part of his residuary estate. When, however, it is not merely that the testator's description is inapt to define the condition of the property at the time of his death, but the words coupled with the evidence of the testator's surroundings fail to identify the subject-matter itself, it appears that the property will not pass under the bequest. So where a testator gave the lease of the house in which he should be living at the time of his decease to his wife, and at the date of the Will he was living in a house he held for a short time at rack rent, and he subsequently bought and went to reside in a freehold house where he died, it was held that the freehold house was not devised to the testator's widow: *Re Knight*, 34 C. D. 518. See also *Blagrove v. Coore*, 27 Beav. 138. In the case of *Wedgwood v. Denton*, L. R. 12 Eq. 290, it was held that a Will bequeathing a house which a testatrix held for the life of T. K., and the term of twenty-one years after, passed a leasehold interest in the same house for seventy-five years which the testatrix had obtained

since the date of the Will on the surrender of the original lease, or at all events that an interest passed for the period of twenty-one years from the death of T. K.

As to what evidence is admissible of the surroundings of the testator, both at the date of his Will and subsequently up to his death, see *Castle v. Fox*, L. R. 11 Eq. 542. In that case the testator devised "Cleeve Court with the appurtenances," and Malins, V.-C., held that the whole of the evidence showing what the testator treated as part of the Cleeve Court estate, not only before but between the date of his Will and his death, was as legitimate as any evidence that could be given, for the purpose of putting the Court in the position of the testator. Where a testator uses language which is not in itself definite, but is to a certain extent popular, and does not point out the subject referred to by any strict boundary, then the Court will apply the knowledge, that it may acquire from extrinsic circumstances, to the interpretation of the words he has used in his Will, and when the Court arrives at anything which completely exhausts the whole of those words, then, and not till then, is there a restriction in the enquiry and examination into extrinsic circumstances, *Webb v. Byng*, 1 K. & J. 580. See also *Doe v. Jersey*, 3 B. & C. 870; and *Okeden v. Clifden*, 2 Russ. 308.

reference to the day of the death.

It has been held that a Will is not to be construed as to make a will, but to give a right of inheritance (a) included by the testator.

Upon this evidence in the case of *Wholly inapplicable with respect to* because the testator, but only comprised in the persons in the Act (z).

It is further re-executed, or for the purpose of the time at which published, or

(v) *Cole v. St. 529. Post, Pt. I. § VIII. See Doe v. Kay*, 400, 404, *Burnett*, 1 Kay 348, as to the testator bequeathing some one genus of "all debts due to all "my stock." Wills Act on cases be considered h. III. Bk. III. Ch. I. (c) *Price v. 198, 202, ante*, *Phelps*, L. R. 2 has the Married

reference to the day of the date of the Will, and not to the day of the death (u).

It has been decided that the effect of this section is not to make a will valid, which was invalid in its inception (e.g. a Will of a married woman unauthorised by a Power),

but to give a rule for the construction of a valid testamentary instrument (x). But the Will of a married woman is not excluded by the 8th section from the operation of this section (y).

Will of married woman not excluded by s. 8 from the operation of s. 24 :

Upon this enactment it may be further remarked, that even in the case of Wills within its operation, it has not rendered wholly inapplicable the doctrines which have just been stated with respect to the consequences of the republication of Wills ; because the statute does not enact absolutely that the Will shall speak as if it had been made just before the death of the testator, but only that it shall do so in respect of the property comprised in it. Therefore, with respect to the description of persons in the Will, the law remains as before the passing of the Act (z).

It is further enacted by the 34th section, that " every Will re-executed, or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

1 Vict. c. 26, s. 34 :
a Will republished, &c., shall be deemed to have been made when republished :

(u) *Cole v. Scott*, 1 Mac. & G. 529. *Post*, Pt. III. Bk. III. Ch. IV. § VIII. See *Douglas v. Douglas*, Kay, 400, 404, and *Goodlad v. Burnett*, 1 Kay & J. 341, 347, 348, as to the cases where the testator bequeathed the whole of some one *genus* of his property, as "all debts due to me on bond," or, all "my stock." The effect of the Wills Act on cases of this kind will be considered hereafter. See Pt. III. Bk. III. Ch. IV. § VIII.

(x) *Price v. Parker*, 16 Sim. 198, 302, *ante*, p. 58. *Noble v. Phelps*, L. R. 2 P. & D. 276. Nor has the Married Women's Property

Act, 1882, altered the law in this respect. *Re Price*, 28 C. D. 709.

(y) *Thomas v. Jones*, 1 De G., J. & S. 62. *Noble v. Phelps*, L. R., 2 P. & D. 276. See also *Willock v. Noble*, L. R. 7 H. L. 590, *per Cairns, C.* See *ante*, p. 46.

(z) *Bullock v. Bennett*, 7 De G. M. & G. 283. It must be remembered that since the Wills Act nothing short of re-execution of the Will itself, or the formal execution, under the Act, of some document affirming it, can be held to confer any new testamentary validity upon it. See *ante*, p. 166.

A codicil may give effect to unattested alterations or additions to the Will :

A codicil duly executed will give effect and operation to unattested alterations in a Will (d) : or to unexecuted papers, which have been written between the periods of the execution of the Will and codicil, where the Will if treated as executed on the date of the codicil and read, as speaking at that date, contains language which within the principle of *Allen v. Maddock* (e), would operate as an incorporation of the document to which it refers. But, when this is not the case, the mere fact of unexecuted papers having been written or signed, between the date of the Will and that of the codicil, will not suffice to add such papers to the Will by force of republication, or to make that testamentary which would not have been so, if the Will had been originally executed at the later date (f).

or may render valid a previous unexecuted Will, &c.

The general question whether, and in what cases, an unexecuted Will or other paper may be rendered valid as a testamentary disposition by a subsequent duly executed codicil, has been already considered in an earlier part of this Work (g).

Effect of codicil showing intention to revive a destroyed Will.

A testator having, after the Wills Act came into operation, duly executed two wholly inconsistent Wills, destroyed the earlier one *animo revocandi*, and then duly executed a codicil, showing an intention to revive it. Dr. Lushington held that this codicil necessarily revoked the later Will, though it might be inoperative to revive the earlier one by reason of its having been so destroyed. The learned judge further expressed the inclination of his opinion (though it was not necessary to decide that question) that probate could not be decreed of the draft of the destroyed Will; for that it was an unexecuted paper, not specifically adverted to or recognised by the codicil. But he gave no opinion on the point, (which indeed does not appear to have

(d) *Per* Sir H. Jenner Fust, in *Skinner v. Ogle*. 4 Notes of Cas. 79. In the goods of Wyatt, 2 Sw. & Tr. 494.

(e) 11 Moo. P. C. 437.

(f) In the goods of Truro, L. R. 1 P. & D. 201. In the goods of Lancaster, 29 L. J. P. & M. 155.

(g) *Ante*, Pt. I. Bk. II. Ch. II. § II. p. 86.

been raised,) was destroyed under the impression that it had been given in draft and the draft was destroyed.

This decision is well as established by the fact that the Will was destroyed by the testator and revived by any codicil (k).

It has been held by a widow being a mere circumstance, that if she wish it, it will be a testamentary disposition made by the testator made by her, and she may recover his unexecuted Will by any force or means, and she regained a son during his fortuitous Will.

(h) See post, Pt. II. § VII.

(i) *Hale v. Telford*, 318.

(k) *Rogers v. Rogers*, 318. & Tr. 342. In *L. R.* 1 P. & D. judge, moreover, codicil did not

been raised,) whether as in the case of a lost Will, or a Will destroyed unduly or *sine animo revocandi* (h), probate might have been granted of the Will itself, as contained in the draft and the depositions of the witnesses (i).

This decision was approved and acted on by Sir C. Cresswell as establishing the principle that where a Will had been destroyed by the testator, or with his approval, it cannot be revived by any intention of his manifested in a subsequent codicil (k).

It has been already observed, that although a Will made by a widow before or during coverture, will not revive by the mere circumstance of her husband's death, yet if she republish it, it will become valid (l). Likewise, although if the testator made his Will while *non compos*, and afterwards recover his understanding, the Will does not thereby obtain any force or strength (m); yet if he should, after having regained a sound state of mind, republish the Will made during his former insanity, it would doubtless become a valid Will.

Effect of republication by a widow:

by a person formerly of non-sane memory, who has recovered his understanding.

(h) See *post*, Pt. I. Bk. IV. Ch. II. § VII.

(i) *Hale v. Tokelove*, 2 Rob. 318.

(k) *Rogers v. Goodenough*, 2 Sw. & Tr. 342. In the goods of Steele, L. R. 1 P. & D. 575. The learned judge, moreover, held that the codicil did not revoke an inter-

mediate Will, not being inconsistent therewith and not showing any intention to revoke it. See *ante*, p. 155.

(l) *Ante*, pp. 49, 58. See *Du Hourmelin v. Sheldon*, cited *ante*, p. 174.

(m) *Swinb. Pt. 2. s. 3, pl. 2. Godolph. Pt. 1, c. 8, pl. 2.*

BOOK THE THIRD.

OF THE APPOINTMENT OF EXECUTORS, AND THE ACCEPTANCE
OR REFUSAL OF THE OFFICE.

Definition of
term "execu-
tor."

THE word Executor, as the term is at present accepted, may be defined to be, The person to whom the execution of a last Will and Testament of personal estate is, by the testator's appointment, confided (*d*). "To appoint an executor," says Swinburne (*e*), "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his Will."

Bare nomina-
tion of execu-
tor entitles
Will to
probate.

The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a Will, and as a Will it is to be proved (*f*).

(*d*) 2 Black. Comm. 503. Far-
rington v. Knightly, 1 P. Wms.
548, 549. Toller, 30.

(*e*) Swinb. Pt. 4, s. 2, pl. 2.
Brownrigg v. Pike, 7 P. D. 61-64.

(*f*) Godolph. Pt. 2, c. 5, s. 1.
Brownrigg v. Pike, 7 P. D. 61-64.
In the goods of Lancaster, 1 Sw.
& Tr. 464. This seems to be so
even though the Will deals only
with realty: In the goods of Jordan,
L. R. 1 P. & D. 555. But
such a Will cannot be proved if
no executor be appointed: In the
goods of Bootle, L. R. 3 P. & D.
177. Nor if the Will be that of a
married woman in execution of a
power, which relates only to real
estate. O'Dwyer v. Geare, 1 Sw.

& Tr. 465. In the goods of Bar-
den, L. R. 1 P. & D. 325. In the
goods of Tomlinson, 6 P. D. 209.
See In the goods of Hornbuckle, 15
P. D. 149, 151. But the Will
of a married woman dealing only
with realty, but appointing exe-
cutors, is entitled to probate where
a portion of the estate consists of
personalty vested in her by virtue
of the Married Women's Property
Act, 1882: In the goods of
Cubbon, 11 P. D. 169. Or of pro-
perty to which she is entitled as
separate estate: Brownrigg v. Pike,
7 P. D. 61. See also In the goods
of Hornbuckle, 15 P. D. 149. See
ante, p. 58, 162.

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(*a*) 2 Black. Co
(*b*) Swinb. Pt.
(*c*) Godolph. P
(*d*) 4 Inst. 335
(*e*) 1 Black. Co
Dig. Admon. B.
Ex. c. 1, p. 39,

CHAPTER THE FIRST.

WHO IS CAPABLE OF BEING AN EXECUTOR.

GENERALLY speaking, all persons who are capable of making Wills, and some others besides, are capable of being made executors (*a*). From the earliest time it has been a rule, that every person may be an executor, saving such as are expressly forbidden (*b*).

Who may be
an executor.

It seems to be admitted that the King may be constituted executor; in which case he appoints such persons as he shall think proper to officiate the execution of the Will, against whom such as have cause of action may bring their suits: also the King may appoint others to take the accounts of such executors (*c*). Thus, Katherine, Queen Dowager of England; mother of Henry the Sixth, made her last Will and Testament, and, thereof constituted King Henry the Sixth her sole executor: Whereupon the King appointed Robert Rolleston, keeper of the great wardrobe, John Mers-ton, and Richard Alreed, esquires, to execute the said Will, by the oversight of the Cardinal, the Duke of Gloucester, and the Bishop of Lincoln, or two of them, to whom they should account (*d*).

The King.

Doubts have been entertained whether a Corporation aggregate can be executor; principally because they cannot prove a Will, or at least cannot take the oath for the due execution of the office (*e*). But there are authorities in

Corporations.

(a) 2 Black. Comm. 503.

(b) Swinb. Pt. 5, s. 1, pl. 1.

(c) Godolph. Pt. 2, c. 1, s. 2.

(d) 4 Inst. 335.

(e) 1 Black. Comm. 477. Com. Dig. Admon. B. (2). Went. Off. Ex. c. 1, p. 39, 14th edit. The

other grounds of the last author's doubt are stated to be: 1st, Because they cannot be feoffees in trust, to others' use: 2ndly, They are a body framed for a special purpose.

A Partnership Firm.

favour of the capability (*f*); and it is said to be now settled, that on their being so named, they may appoint persons styled Syndics, to receive administration with the Will annexed, who are sworn like other administrators (*g*). No doubt appears ever to have been entertained, but that a corporation sole may be executor (*h*). Where a testator in India nominated his brother, and "Messrs. Cockerell & Co., East India agents, London," and one A. B., to be his executors, and before his death the firm of Cockerell & Co., which consisted of four members, had been dissolved, Sir H. Jenner Fust held that the appointment was not of the firm collectively, but of the persons composing it individually, and that each of the members was entitled to be joined in the probate with the other executors (*i*).

Aliens.

By the "Naturalization Act, 1870," an alien has the same capacity of taking, acquiring, holding and disposing of property as if he were a natural-born British subject (*k*), and is therefore capable of being an executor (*l*).

Infants.

An infant may be appointed executor, how young so ever he be (*m*), and even a child *in ventre sa mere* (*n*), (who is considered in law, to all intents and purposes, as actually born) (*o*), inasmuch that when such is so appointed, if the mother bring forth two or three children at that one birth, they are all to be admitted executors (*p*). But if an infant

38 Geo. III.
c. 87: sole

(*f*) Swinb. Pt. 5, s. 9. Godolph. Pt. 3, c. 1, s. 1. 1 Roll. Abr. tit. Executors, T. 7, citing 12 E. 4, 9, b.

(*g*) 3 Bac. Abr. by Gwillim, p. 5, tit. Executors, A. 2. Toller, 30, 31. In the goods of Darke, 1 Sw. & Tr. 516. But the grant will not be made until the appointment of Syndics is before the Court, *ibid*.

(*h*) Godolph. Pt. 2, c. 6. Wentw. Off. Ex. p. 39, 14th edit. See In the goods of Haynes, 3 Curt. 75.

(*i*) In the goods of Fernie, 6 Notes of Cas. 657.

(*k*) See stat. 33 & 34 Vict. c. 14, s. 2. See *ante*, p. 9.

(*l*) As to the question of the capability of aliens to be executors prior to the passing of the above Act, see the former editions of this work, Pt. I. Bk. III. Ch. I.

(*m*) Wentw. Off. Ex. c. 18, p. 390, 14th edit. Swinb. Pt. 5, s. 1, pl. 6.

(*n*) Godolph. Pt. 2, c. 9, s. 1.

(*o*) 2 Saund. 387, note to Purfoy v. Rogers.

(*p*) Godolph. Pt. 2, c. 9, s. 1.

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(*q*) See In the g
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Pt. I. Bk. v. Ch. II
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as executor at the
Godolph. Pt. 2, c.
Pt. 5, s. 1, pl. 6.
(*r*) Pigot and C
cited Brownl. 46.
maine, 1 Mod. 47,

be appointed *sole* executor, by statute 38 Geo. III. c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration, *cum testamento annexo*, shall be granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant shall have attained the age of twenty-one years (*q*). This Act only applies in case of an infant being sole executor; for if there are several executors, and one of them is of full age, no administration *durante minore ætate* ought to be granted; for he who is of full age may execute the Will (*r*).

It has been said, that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have the execution of the Will (*s*): and in *Prince's case* (*t*), it was resolved by the justices of the Common Pleas, that if administration be committed during the minority of the executrix, and she take husband of full age, then the administration shall cease. But this has since been doubted (*u*).

whether if an infant executrix take husband of full age he shall have the execution.

Formerly a married woman could not by the Law of England take upon her the office of executrix or administratrix without the consent of her husband. But now by the Married Women's Property Act, 1882, [which came into force Jan. 1, 1883] it is enacted (sect. 1, sub-s. 2), "that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract . . . as if she were a *feme sole*," and also (sect. 24) "the word 'contract' in the Act shall include

Feme covert :

Married Women's Property Act, 1882, 45 & 46 Vict. c. 75.

s. 1 (sub-s. 2) :

s. 24 :

(*q*) See *In the goods of Stewart*, L. R. 3 P. & D. 244. *Post*, Pt. I. Bk. v. Ch. III. § III. Before the passing of this Act the law considered him capable of acting as executor at the age of seventeen: *Godolph. Pt. 2*, c. 9, s. 2. *Swinb. Pt. 5*, s. 1, pl. 6.

(*r*) *Pigot and Gascoigne's case*, cited *Brownl. 46*. *Foxwist v. Tremaine*, 1 Mod. 47, by Twysden, J.

See further, *post*, Pt. I. Bk. v. Ch. III. § III. as to infant executors and administration *durante minoritate*. See also 2 Williams' Notes to Saunders, 637.

(*s*) *Wentw. Off. Ex. c. 18*, p. 392. *Toller*, 31.

(*t*) 5 Co. 29, *b*.

(*u*) See *post*, Pt. I. Bk. v. Ch. III. § III.

s. 18.

Extent of
application of
Married
Women's Pro-
perty Act.

Persons attaint
and outlaws.

the acceptance of any trust or of the office of executrix or administratrix" The Act also (sect. 18) enables a married woman who is an executrix or administratrix alone or jointly with any person or persons of the estate of any deceased person to act in such office as if she were a *feme sole* for purposes of action, transfer of stock, &c., without any consent on the part of her husband. These sections would seem to apply to any married woman whether married before or after the commencement of the Act, and so since this date (Jan. 1, 1883) it has become unnecessary to consider the question as to the consent of the husband, as the wife as such executrix or administratrix now acts independently of him in all respects as if she were a *feme sole*.

There are few or none, who, by our law, are disabled, on account of their crimes, from being executors: and therefore it has always been holden, that persons attainted or outlawed may sue as executors, because they sue *in auter droit*, and for the benefit of the parties deceased (*v*). And it has been decided that a person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the Will by which he is appointed executor; for that his office being *in auter droit* was not forfeited by the conviction (*x*). By the civil and canon law,

(*v*) Wentw. Off. Ex. 36, 14th edition. Godolph. Pt. 2, c. 6, s. 1. Vin. Abr. tit. Outlawry, n. a. pl. 2. So a villein was capable of being an executor: Swinb. Pt. 5, s. 1, pl. 3; Off. Ex. 36, 14th edition: and the lord could not seize those goods which he had to the use of the deceased; and he might sue his lord for a debt due to the testator: Lit. B. 2, c. 11, s. 192. But it was held that an outlaw could not move to have an attorney's bill taxed, where he (the outlaw) was administrator, with the Will an-

nexed, by which all the personal estate was bequeathed to him, subject to payment of the debts, &c., and one of the bills which he sought to tax related to business done for himself and the testatrix jointly, and the other to business done for the testatrix alone: *Re Mander*, 6 Q. B. 867.

(*x*) *Smethurst v. Tomlin*, 2 Sw. & Tr. 143. Nor will the Court pass over an executor by reason of his bad character only. In the goods of Samson, L. R. 3 P. & D. 48.

Ch. I.] Who

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(*y*) Swinb. Pt. 5,
10. Godolph. Pt. 2,

(*z*) *Rex v. Sir R*
1 Lord Rayn. 361.
399. 3 Salk. 162.
Carth. 457. Holt,
thwaite v. Russell
S. C. Barnard. Cha
also 3 P. Wms. 33
ning v. Style.

(*a*) *Hills v. Mill*
(*b*) By Lord Mar
Simpson, 1 W. Bla

indeed, not only traitors and felons, but heretics, apostates, usurers, famous libellers, incestuous bastards, and many others, are incapable of being executors (y).

The Court cannot refuse to grant the probate of a Will to a person appointed executor, on account of his poverty or insolvency. Therefore, where, to a *mandamus* to the judge of the Prerogative Court, to grant the probate of a Will to a person named executor therein, the Ordinary returned that he was an absconding person, and insolvent, and that he refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the Ordinary has no authority to interpose and demand caution of the executor when the testator himself required none (z).

Persons in mean or insolvent circumstances :

So where, after probate of the Will, the executor became bankrupt, and a suit was commenced in the Ecclesiastical Court to revoke the probate, and grant administration to another; the Court of Queen's Bench granted a prohibition (a).

The consequence of these decisions was, that the Court of Chancery was forced to assume a new jurisdiction (b): and that Court restrained an insolvent or bankrupt executor, and appointed a receiver: and if it was necessary to bring actions at law to recover part of the effects, since that must be in the name of the executor, the Court compelled him to allow his name to be used (c).

when the Court of Chancery controlled insolvent executors by the appointment of receivers :

(y) Swinb. Pt. 5, s. 2, 3, 4, 7, 9, 10. Godolph. Pt. 2, p. 6.

(z) Rex v. Sir Richard Raines, 1 Lord Rayn. 361. S. C. 1 Salk. 299. 3 Salk. 162. 1 Stra. 672. Carth. 457. Holt, 310. Hathornthwaite v. Russell, 2 Atk. 127. S. C. Barnard. Chan. C. 334. See also 3 P. Wms. 336, note to Slanning v. Style.

(a) Hills v. Mills, 1 Show. 293.

(b) By Lord Mansfield, in Rex v. Simpson, 1 W. Black. 458.

(c) Uterson v. Mair, 2 Ves. jun. 95. Scott v. Becher, 4 Price, 346. In like manner it restrained the assignees of a bankrupt executor from paying over the fund to him, and this upon petition in the bankruptcy, from the peculiar authority it had over them: *Ibid.* Possibly now, however, since the fusion by the Judicature Act of all the Courts into one, the Probate Division would refuse to grant probate in any case where Equity would

But if a person, *known* by the testator to be a bankrupt or insolvent, be appointed an executor by him, such person cannot, on the ground of insolvency alone, be controlled by the appointment of a receiver (*d*). It is not, however, to be inferred from the circumstance of the Will having been made some time before the commission, and not altered afterwards, that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor (*e*). It must be observed, finally, that the Court will certainly not grant a receiver upon the single ground, that the executor is in mean circumstances (*f*).

The general principle upon which the Court will restrain executors and administrators by the appointment of receivers will be pointed out hereafter (*g*).

Non compotes.

By our law, as well as by the civil law, idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust or not (*h*).

Therefore it has been agreed, that if an executor become *non compotes*, the Court may, on account of this natural disability, commit administration to another (*i*).

restrain the executor (if probate were granted to him) and appoint a receiver. See *In the goods of Gunn*, 9 P. D. 242. As to the disability in former times of persons excommunicated, Roman Catholics, persons denying the Trinity, &c., and persons not qualifying for office, see the former editions of this Work, Pt. I. Bk. III. Ch. I.

(*d*) *Gladdon v. Stoneman*, 21st March, 1808, *coram* Lord Eldon, C., reported in a note to 1 Madd. 143. *Langley v. Hawke*, 5 Madd. 46. *Stainton v. The Carron Com-*

pany, 18 Beav. 146, 161.

(*e*) *Langley v. Hawke*, 5 Madd. 46.

(*f*) *Hathornthwaite v. Russell*, 2 Atk. 126. S. C. *Barnard. Chanc. Cas.* 334. *Anon.* 12 Ves. 4. *Howard v. Papera*, 1 Madd. 142.

(*g*) *Infra*, Pt. v. Bk. II. Ch. II.

(*h*) *Godolph. Pt. 2, c. 6, s. 2. Bac. Abr. Exors. (A.) 5.* 2 Robert. 133, 134.

(*i*) *Hills v. Mills*, 1 Salk. 36. *Evans v. Tyler*, 2 Robert. 128, 134. See *post*, Pt. I. Bk. v. Ch. III. § VI.

OF THE APPOINTMENT OF AN EXECUTOR

AN Executor can be appointed only (1)

His appointment is in which case he is to be in the tenor; for, although the Will by the circumlocution of the testator more the charge of an executor, it constitutes him

As if he declares his goods after his death to be disposed at his pleasure, he made executor (2) of my goods to the disposition of A

(a) A Will (says the Office of Executors edit.) is the only instrument by which an executor can be appointed. According to the doctrine, an executor is primarily appointed

(b) *Swinb. P. C.* *Godolph. Pt. 2, c. 6, s. 2.* *Off. Ex. 20, 14th* of goods of Manly, 3

(c) *Ibid.* *Hentf. Moore, P. C. C. 33*

CHAPTER THE SECOND.

OF THE APPOINTMENT OF EXECUTORS—BY WHAT WORDS
EXECUTORS MAY BE APPOINTED.

AN Executor can derive his office from a testamentary appointment only (a).

His appointment may either be express, or constructive; in which case he is usually called executor *according to the tenor*; for, although no executor be expressly nominated in the Will by the word executor, yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (b).

As if he declare by his Will that A. B. shall have his goods after his death to "pay his debts, and otherwise to dispose at his pleasure," or to that effect, by this A. B. is made executor (c). So if the testator say, "I commit all my goods to the administration of A. B." (d), or, to "the disposition of A. B." (e); in this case he is made executor.

Executor according to the tenor :

by words pointing at the office or rights of an executor :

(a) A Will (says the author of the Office of Executor, p. 3, 14th edit.) is the only bed where an executor can be begotten or conceived. According to the old doctrine, an executor could not be primarily appointed in a codicil.

(b) Swinb. Pt. 4, s. 4, pl. 3. Godolph. Pt. 2, c. 5, s. 2. Wentw. Off. Ex. 20, 14th edition. In the goods of Manly, 3 Sw. & Tr. 56.

(c) *Ibid.* Henfrey v. Henfrey, 4 Moore, P. C. C. 33. So where one

said on his death-bed to his wife that she *should pay all and take all*, by this she was executrix: Brightman v. Keighley, Cro. Eliz. 43.

(d) Godolph. Pt. 2, c. 5, s. 3. Bro. Executors, pl. 73.

(e) Pemberton v. Cony, Cro. Eliz. 164. Godolph. Pt. 2, c. 5, s. 3. So if he says, "I will that A. B. shall dispose of my goods which are in his custody," he is thereby made executor of those parcels or goods: *Ibid.*

And where certain persons were directed by the Will to pay debts, funeral charges, and the expenses of proving the Will, they were held to be clearly executors according to the tenor (*f*). So where the testator in a codicil said, "I appoint my nephew my residuary legatee, to discharge all lawful demands against my Will," the nephew was admitted executor (*g*). So if the testator say, "I make A. B. lord of all my goods" (*h*), or "I make my wife lady of all my goods" (*i*), or "I leave all my goods to A. B." (*k*), or "I leave A. B. legatary of all my goods" (*l*), or "I leave the residue of all my goods to A. B." (*m*), it will amount to the appointment of such persons respectively as executors according to the tenor (*n*). And where by his Will a testator said, "I appoint A. B. and C. D.," but did not state in what capacity he appointed them: and also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it, the Court held that by the words of the Will A. B. and C. D. were appointed

(*f*) In the goods of Fry, 1 Hagg. 30. See also In the goods of Almosnino, 1 Sw. & Tr. 508. In the goods of Collett, Dea. & Sw. 274. In the goods of Baylis, L. R. 1 P. & D. 21. In the goods of Adamson, L. R. 3 P. & D. 253. In the goods of Bell, 4 P. D. 85. In the goods of Lush, 13 P. D. 20.

(*g*) *Great v. Jealie*, 3 Phillim. 116.

(*h*) *Godolph. Pt. 2, c. 5, s. 3.* *Swinb. Pt. 4, s. 4, pl. 3.*

(*i*) *Swinb. Pt. 4, s. 4, pl. 3.*

(*k*) *Godolph. Pt. 2, c. 5, s. 3.* *Swinb. Pt. 4, s. 4, pl. 3.*

(*l*) *Ibid.*

(*m*) *Ibid.* "I devise all my personal goods to my two daughters and my wife, whom I make executrix;" this was holden to appoint them all three executrices: Fox-

with *v. Tremaine*, Ventr. 102. So where a Will contained a clause to the effect "I appoint my sister A. B. my executrix, only requesting that my nephews C. D. and E. F. will kindly act for and with this dear sister." C. D. and E. F. were held to be executors according to the tenor: In the goods of Brown, 2 P. D. 110. See *Powell v. Stratford*, 3 Phil. 118.

(*n*) In *Androvin v. Poilblanc*, 3 Atk. 301, Lord Hardwicke said, a person named "universal heir," in a Will, would have a right to go to the Ecclesiastical Court for the probate. But it has lately been held otherwise as to a person named universal legatee: in the goods of Oliphant, 1 Sw. & Tr. 525.

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(*o*) In the goods of *P. D. 215.*

(*p*) In the goods of *P. D. 22.*

(*q*) In the goods of *Sw. & Tr. 525.*

(*r*) *Wentw. O*
edition. But if

executors (o). Again, where a testator did not specifically appoint any executor but nominated four persons to act as his trustees, and bequeathed to them his residuary estate, with power to receive any sums due to the residue, and to give a discharge for the same, and in the Will gave directions to his "executors," using the terms "trustees" and executors indifferently, as referring to the same persons, it was held that the trustees were executors according to the tenor, and entitled to probate (p). But it appears that the practice of the Prerogative Court has been to grant administration with the Will annexed to the universal legatee of a testamentary paper, but not to decree probate to him as executor according to the tenor. And Sir C. Cresswell, on a late occasion, adhered to this practice (q).

Where the testator gave divers legacies, and then appointed that, his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his Will, this was held by three common law judges to make her executrix (r). Again, where the Will said nothing of the testator's debts, but contained only devises of real and personal legacies, to be paid within two months after his death, and concluded, without any bequest of the residue or express appointment of executors, in these words, "I appoint A. B., C. D., and E. F., to receive and pay the contents above mentioned;" Sir G. Lee held that the persons so named were executors according to the tenor; for they could not receive and pay the legacies without collecting in the effects; and no one can assent to a legacy but he that has the management of the estate, because legacies cannot be paid till after the debts, and he only who

(o) In the goods of Bradley, 8 P. D. 215.

(p) In the goods of Leven, 15 P. D. 22.

(q) In the goods of Oliphant, 1 Sw. & Tr. 525.

(r) Wentw. Off. Ex. p. 20, 14th edition. But if the testator be-

queath the residue of his goods *the debts discharged*, in this case, according to Swinburne, the universal legatary doth still remain legatary, and is to receive his legacy at the hands of the executor or administrator: Swinb. Pt. 4, s. 4, pl. 7.

has the management of the estate knows whether the assets are sufficient (s).

Where persons have been held not to be executors according to the tenor :

But where a testator, being entitled to many shares in the Sun Fire Office, and in the mines of Scotland, and a lease for years of a coal-meter's place, gave the same, by a Will containing no appointment of an executor, to trustees in trust for his daughter, and after several contingencies gave the remainder thereof to his son, and if he should die in his minority without issue, gave the remainder thereof to the trustees for their own use, and gave all the residue of his estate to the said trustees, to pay one moiety to his daughter, and the other moiety to his son ; Sir G. Lee held that there were no words in this Will that made the trustees executors ; inasmuch as they had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor (t). So where the whole personal estate was left to a trustee on trust for a specific purpose, and no executor was named in the Will, it was held by Sir C. Cresswell that such trustee was not entitled to probate as executor according to the tenor (u).

by necessary implication.

An executor may be appointed by necessary implication :

(s) *Pickering v. Towers*, 2 Cas. temp. Lee, 401.

(t) *Boddicott v. Dalzeel*, 2 Cas. temp. Lee, 294. See also *Fawkenor v. Jordan*, *ibid.* 327 ; and *Moss v. Bardwell*, 3 Sw. & Tr. 187, as to the distinction between the offices of trustee and executor.

(u) In the goods of *Jones*, 2 Sw. & Tr. 155. Unless the Court can gather from the words of the Will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof : In the

goods of *Punchard*, L. R. 2 P. & D. 369. In the goods of *Lowry*, L. R. 3 P. & D. 157. In the goods of *Baylis*, L. R. 1 P. & D. 21. In the goods of *Stewart*, L. R. 3 P. & D. 244. But a direction in a Will to a person to pay the testator's debts or funeral expenses out of a particular fund and not out of the general estate, does not constitute such person executor according to the tenor : In the goods of *Davis*, 3 Curt. 748. In the goods of *Toomy*, 3 Sw. & Tr. 562. In the goods of *Fraser*, L. R. 2 P. & D. 183.

as where the testator, if C. D. if he please, intended to give a legacy to among the rest after which legacy within-named appoint A. B. Will and Testator decreed to C. D. the tenor of the child, his brother Will, " Forasmuch as I make A. B. my executor the testator thought So where a man that none should his son came to this J. S. was held of his son (a).

There is a great or overseer, and

(z) *Godolph. Pt. Swinb. Pt. 4, s. 4*. testator makes A. executors, in this both be executors, be construed, " and Pt. 2, c. 5, s. 3, c. 2

(y) *Naylor v. S. temp. Lee, 54.*

(c) *Godolph. Pt. Swinb. Pt. 4, s. 4,*

(a) *Brightman v. Eliz. 43. However Pt. 3, c. 3, s. 5, i that if the testator son, A. B., marry him not be my executor of my 'executors,'*

Ch. II.] *Of the Appointment of Executors.*

as where the testator says, "I will that A. B. be my executor, if C. D. will not;" in this case C. D. may be admitted, if he please, into the executorship (*x*). So where the testator gave a legacy to A. B. and several legacies to other persons, among the rest, to his daughter-in-law, C. D.: immediately after which legacies followed these words; "but should the within-named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last Will and Testament, and give her the residue;" probate was decreed to C. D., as executrix by implication, according to the tenor of the Will (*y*). Or if the testator supposing his child, his brother, or his kinsman to be dead, say in his Will, "Forasmuch as my child, my brother, &c., is dead, I make A. B. my executor," in this case, if the person whom the testator thought dead be alive, he shall be executor (*z*). So where a man made his last Will, and did will thereby, that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S., by this J. S. was held to be made executor during the minority of his son (*a*).

There is a great distinction between the office of coadjutor, or overseer, and that of executor. The coadjutor, or over-

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(*z*) Godolph. Pt. 2, c. 5, s. 3. Swinb. Pt. 4, s. 4, pl. 6. If the testator makes A. B. or C. D. his executors, in this case they shall both be executors, for "or" shall be construed, "and;" Godolph. Pt. 2, c. 5, s. 3, c. 3, s. 1.

(*y*) *Naylor v. Stainsby*, 2 Cas. temp. Lee, 54.

(*x*) Godolph. Pt. 2, c. 5, s. 3. Swinb. Pt. 4, s. 4, pl. 6.

(*a*) *Brightman v. Keighley*, Cro. Eliz. 43. However, in Godolphin, Pt. 3, c. 3, s. 5, it is laid down that if the testator say, "If my son, A. B. marry with C. D., let him not be my executor," or "one of my executors," this would not

hold; because an "executor may not be instituted, nor the office of executor inferred, only by conjecturals." Where a testatrix executed a Will containing these words: "I leave the sum of one sovereign each to the executor and witness of my Will for their trouble to see that everything is justly divided," but not naming any executor, and beneath the signature of the testatrix, and opposite the names of the attesting witnesses were the words "executors and witnesses," the Court held that there was no appointment of executors. In the goods of Woods, L. R. 1 P. & D. 556.

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seer, has no power to administer or intermeddle otherwise than to counsel, persuade, and advise; and if that fail to remedy negligence or miscarrying in the executors, he may complain to the Court, and his charges in so doing ought to be allowed out of the testator's estate (b). It is therefore material to inquire what words in a Will amount only to an appointment as coadjutor, or overseer. If A. be made an executor, and B. a coadjutor, without more, he is not by this made a joint executor with A. (c). But if A. be made executor, and the testator after, in his Will, expresseth that B. shall administer also with him, and in aid of him, here B. is an executor as well as A., and may prove the Will alone as executor, if A. refuse (d). Where an infant was made an executor, and A. and B. *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant, by this they were held to be executors in the meantime (e).

An executor by
the tenor may
be admitted to
probate jointly
with an execu-
tor expressly
nominated.

Although when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated. Thus in *Powell v. Stratford* (f), the testator's

(b) Wentw. Off. Ex. 2, 14th edition. Sir Thomas Ridley takes occasion to wish that overseers might be made of more use; although he says, they be looked upon only as candle-holders; having no power to do anything but hold the candle, while the executors tell the deceased's money: Ridley, Pt. 4, c. 2. 4 Burn, E. Law, 126, 8th edition.

(c) Bro. Executors, pl. 73. Wentw. Off. Ex. 21, 14th edition. Godolph. Pt. 2, c. 2, s. 4. The words in the year-book, 21 H. VI. 6, are, "I will that A. and B. shall

be my executors, and also that I. and K. be coadjutors of the same A. and B. to distribute my goods."

(d) Bro. Executors, pl. 73. Wentw. Off. Ex. 21, 14th edit. Where a testator willed that A. and B. should be his executors, and that I. and K. should be the executors of A. and B. to dispose of his goods, they are all executors: Dyer, 4, pl. 10, in marg.

(e) Wentw. Off. Ex. 21, 14th edit.

(f) 3 Phil. 118. In the goods of Brown, 2 P. D. 110.

wife was expressed to assist her, he might be case (g), the de the Will named residuary leg when his nephew one years, the residuary leg my Will and held that the And in a subsequent nominated for be executor, ad

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(g) Grant v. I 116.

(h) Lynch v. I 484.

(i) In the goods Hagg. 336.

(k) In the goods Hagg. 548: The case died in 16 John Nicholl said

wife was expressly named as executrix; and Lord H. was to assist her, but he was not called executor; the Court said he might be so according to the tenor. So in another case (g), the deceased left a Will and four codicils; and in the Will named certain persons executors, and his nephew residuary legatee: in the last codicil, dated at a time when his nephew was on the point of attaining twenty-one years, the words were, "I appoint my nephew my residuary legatee to discharge all lawful demands against my Will and codicils signed of different dates:" It was held that the nephew should be joined in the probate. And in a subsequent case, where an executor was expressly nominated for general purposes, another person was held to be executor, according to the tenor, for limited purposes (h).

Again, in a case where a person had been expressly appointed executor for a limited purpose in a Will, it was held, that he was appointed general executor by a codicil, by implication merely, without express words (i).

A general appointment by implication after an express limited one.

In another case, where a person by his Will directed that the legatees should appoint two persons to execute his testamentary bequests, probate was granted in the Prerogative Court to the nominees as executors; and on that occasion the Deputy Registrar informed the Court that, in practice, instances had frequently occurred of granting probates to persons nominated by those authorized by the testator so to nominate (k). And it has been held, that the Wills Act does not preclude this practice (l).

Appointee of legatees.

An executor may be appointed solely, or in conjunction

Several executors:

(g) *Grant v. Leslie*, 3 Phillim. 116.

(h) *Lynch v. Bellew*, 3 Phillim. 424.

(i) In the goods of *Aird*, 1 Hagg. 396.

(k) In the goods of *Cringan*, 1 Hagg. 548: The testator in this case died in Scotland; and Sir John Nicholl said he was informed

that such a provision, as to the appointment of executors, is not very unusual in that country. See in the goods of *Ryder*, 2 Sw. & Tr. 127, where the person authorised to nominate had nominated himself, and probate was granted to him.

(l) *Infra*, p. 197, note (e).

and in several degrees.

Substituted executors.

If instituted executor accepts office and dies intestate the substitutes are all excluded :

with others : but in the latter case they are all considered in law in the light of an individual person (*m*). Likewise a testator may appoint several persons as executors in several degrees : as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor ; and if his son will not or cannot be executor, then he makes his brother, and so on (*n*). In which case the wife is said to be *instituted* executor in the first degree, B. is said to be *substituted* in the second degree, C. to be *substituted* in the third degree, and so on (*o*). It must be observed, that if an instituted executor once accepts the office, and afterwards dies intestate, the substitutes, in what degree soever, are all excluded ; because the condition of law, (if he will not or cannot be executor,) was once accomplished by such

(*m*) Toller, 37. See *post*, Pt. III. Bk. I. Ch. II.

(*n*) Swinb. Pt. 4, s. 19, pl. 1. Godolph. Pt. 2, c. 4, s. 1. So where a testator appointed his son sole executor, but in the event of his going abroad, or being or remaining abroad for upwards of two calendar months, then he appointed B. his executor, and the son after the death of the testator went abroad without taking probate and there remained, Sir J. P. Wilde granted probate to B., but reserved power to the son to prove the Will : In the goods of Lane, 33 L. J., P. M. & A. 185.

(*o*) The substituted executor cannot propound the Will, till the person first named executor has been cited to accept or refuse the office : *Smith v. Crofts*, 2 Cas. temp. Lee, 557. But where a testatrix appointed her nephew Charles her executor, "but in case he shall happen at the time of my decease to be abroad, or from any other cause incapable of

acting as such executor, then and in such case I appoint my nephew Eardley executor, to act only during such time as the said Charles shall be resident abroad, or otherwise incapable of acting," and the nephew Charles died in the lifetime of the testatrix, probate was granted by Sir John Dodson to the nephew Eardley, as executor : In the goods of Wilmot, 2 Robert. 579. In the goods of Langford, L. R. 1 P. & D. 458. In that case an appointment of A. as executor, and "in case of his absence on foreign duty," of B. as executrix, was held to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the Will arose ; A. was in England at the time of the testator's death, but was absent on foreign service in her Majesty's navy when the application for probate was made, and was likely to be absent for some years ; probate was granted to B.

Ch. II.] By

acceptance of testator appointed his death, and the original executor so substituted should appear to have substituted executor, who afterwards (*q*).

Where a testator's Will, and "in case of his absence on foreign duty," should continue B. appointed executor during probate during the lifetime of the testator, might appoint executor where a testator who were not appointed with the testator and executor, there was no probate of the testator's appointment of A. and G. were appointed the third persons.

(*p*) Swinb. Pt. 4, s. 19, pl. 1. Godolph. Pt. 2, c. 4, s. 1.

(*q*) In the goods of the testator, Hagg. 235. In the goods of the testator, 1 Sw. & Tr. 101. In the goods of Foster, L. R. 2 P. & D. 101. It may be admitted that the substituted executor cannot act if the testator dies in the lifetime : In the goods of the testator, L. J., P. M. & A. 185.

acceptance of the instituted executor (*p*). But where a testator appoints an executor, and provides that *in case of his death*, another should be substituted; on the death of the original executor, although he has proved the Will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime, or afterwards (*q*).

unless testator otherwise expressly provides.

Where a testatrix appointed A. and B. executors of her last Will, and "in case of the death of either of them," empowered the survivor to appoint another, "so that there should continue to be two executors:" Upon the death of A., B. appointed C. executor to act with him: C. did not take probate during the lifetime of B.: And it was held by Sir H. Jenner Fust, that probate might pass to C., and that he might appoint another executor to act with him (*r*). So where a testator bequeathed his estate in trust to F. and G., who were nominated executors, with directions *conjunctly* with the testator's wife to appoint a third person as trustee and executor, it was held by Sir H. Jenner Fust that, though there was no probability of agreement between F. and G., and the testator's wife, in the choice of such third person, the appointment of executors was not thereby void, but that F. and G. were entitled to probate, with a power reserved for the third person when appointed (*s*).

Several executors with power to survivor to appoint a fresh one.

(*p*) Swinb. Pt. 4, s. 19, pl. 10. Godolph. Pt. 2, c. 4, s. 2.

(*r*) In the goods of Deichman, 3 Curt. 123.

(*q*) In the goods of Lighton, 1 Hagg. 235. In the goods of Johnson, 1 Sw. & Tr. 17. In the goods of Foster, L. R. 2 P. & D. 304. So he may be admitted if the intention is that the substituted executor shall be executor, if the original executor cannot or will not act, and the latter dies in the testator's lifetime: In the goods of Betts, 30 L. J., P. M. & A. 167.

(*s*) Jackson v. Paulet, 2 Robert. 344. It was objected that, under the Wills Act, probate could be decreed only to a person named in an *aduly* executed testamentary paper. But the Court said, the case was not like one where a testator, in his Will, reserves to himself a power to deal hereafter with his Will by writings not *duly* executed. (See *ante*, p. 89.)

Appointment of executors, in a Will revoked by codicil naming a "sole executor:"

appointment bad for uncertainty.

Where the testator in his Will appointed two persons his executors, and in a codicil named his wife "sole executrix of this my Will," the Court held that the appointment of executors in the Will was revoked (t).

An appointment of "A. as my executor with any two of my sons," was held bad, as to the sons, for uncertainty (u).

(t) In the goods of Lowe, 3 Sw. & Tr. 478. But a reappointment in a subsequent Will of one of the executors named in a former Will with a new co-executor is no revocation of the appointment of executors in the first Will: In the goods of Leese, 31 L. J., P. M. & A. 169. Where, however, in a similar case, the word "sole" was used in a subsequent Will, the first appointment was held to be revoked. In the goods of Baily, L. R. 1 P. & D. 628.

(u) In the goods of Baylis, 2 Sw.

& T. 613. Where a testator, having three sisters living when he made his Will, appointed "one of my sisters" sole executrix, and two of the sisters died in his lifetime. Sir J. Hannen held that the appointment was void from uncertainty. In the goods of Blackwell, 2 P. D. 72. As to the admission of parol evidence to correct an imperfect description of the executor contained in a Will, see in the goods of De Rosaz, 2 P. D. 66.

IN WHAT WA

THE appoint or qualified. certainly, imm to the testator. It may be qua wherein, or th exercised: or t

It may be q much as the ti shall begin, or one appoint a at the expirati uncertain time this is a good two executors, appointed two death of the o the substitute So if a man come to full a in the meant

(a) Toller, 36.

(b) Swinb. Pt Wentw. Off. Ex.

(c) Swinb. Pt

(d) In the g

1 Hagg. 235:

CHAPTER THE THIRD.

IN WHAT WAYS THE APPOINTMENT OF EXECUTOR MAY BE
QUALIFIED.

THE appointment of an executor may be either absolute or qualified. It may be absolute, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time (a). It may be qualified, by limitations as to the time or place wherein, or the subject-matter whereon, the office is to be exercised: or the creation of the office may be conditional.

It may be qualified by limitations in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease, to be executor. Thus if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death (b), or at an uncertain time, as upon the death or marriage of his son (c), this is a good appointment. Where the deceased appointed two executors, and, in case of the death of either of them, appointed two others to be executors in their stead; on the death of the original executor who had alone proved the Will, the substituted executors were admitted to the office (d). So if a man appoints his son to be executor when he shall come to full age (e), such qualified appointment is good: and in the meantime he has no executor. Again, the testator

Appointment
of executor:
absolute:
qualified.

1. Limitations
in point of
time:
as to when the
executor shall
begin to exe-
cute his office:

(a) Toller, 36.

(b) Swinb. Pt. 4, s. 17, pl. 1.
Wentw. Off. Ex. 22, 14th edition.

(c) Swinb. Pt. 4, s. 17, pl. 4.

(d) In the goods of Lighton,
1 Hagg. 235: A proxy of consent

was exhibited from the original
executor who had not proved. See
also Accord. In the goods of John-
son, 1 Sw. & Tr. 17.

(e) Wentw. Off. Ex. 22, 23, 14th
edition.

may appoint the executor of A. to be his executor: and then if he die before A. he has no executor till A. die (*f*). So a man may make A. and B. his executors, and appoint that A. shall not intermeddle during the life of B., and by this they shall be executors successively, and not jointly (*g*).

as to when he shall cease :

Likewise the testator may appoint a person to be his executor for a particular period of time only, as during five years next after his decease (*h*), or during the minority of his son, or the widowhood of his wife (*i*), or until the death or marriage of his son (*k*). In a case (*l*) where a widow was appointed executrix and residuary legatee for life, with remainder, as to the residue, to the nieces of the testator, and by a codicil it was provided, that, in case she thought proper to marry again, she and the nieces should agree on proper persons to be trustees, to whom she was directed to assign all the real and personal estate, in trust for the uses of the Will, but so as not to be liable to the debts, or subject to the power, of her second husband, it was held that her executorship expired on her second marriage.

in these cases an administrator may be appointed till there be an executor, or after the executorship is ended.

2. Limitations in point of place.

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the Court of Probate may commit administration to another person, until there be an executor, or after the executorship is ended (*m*).

In like manner, the appointment may be limited in point of place: as thus, the testator may make A. his executor for his goods in Cornwall, B. for those in Devon, and C. for those

(*f*) Wentw. Off. Ex. 22, 23, 14th edit. Godolph. Pt. 2, c. 2, s. 4.

(*g*) Wentw. Off. Ex. 31, 14th edition. Bro. Executors, 155.

(*h*) Swinb. Pt. 4, s. 17, pl. 1.

(*i*) Wentw. Off. Ex. 29, 14th edition. Godolph. Pt. 2, c. 2, s. 3.

(*k*) Swinb. Pt. 4, s. 17, pl. 4.

(*l*) Bond v. Faikney, 2 Cas. temp. Lee, 371.

(*m*) Swinb. Pt. 4, s. 17, pl. 2. Plowd. 279, 281: This will be an administration *cum testamento annexo*, and the person entitled to it will be discovered by referring to the rules respecting that species of administration: See *post*, Pt. I. Bk. v. Ch. III. § 1.

in Somerset (goods in dif which seems the duty whe

Again, the subject-matter testator may hold stuff, B. estates by ext person may be as touching s

(*n*) Swinb. Pt. 2, Godolph. Pt. 2, Off. Ex. 29, 14th c. Harris, 4 Hagg.

(*o*) Swinb. Pt.

(*p*) Spratt v. L 4 Hagg. 408, 489

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Where W. made land in 1861, and

C. executors the 1863, being in E

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B. and C. withou to E. and F.:

Wallich, 3 Sw.

in Somerset (n) : or he may make different executors for his goods in different dioceses, or different provinces (o) : or, which seems more rational and expedient, he may so divide the duty when his property is in various countries (p).

Again, the power of an executor may be limited as to the subject-matter upon which it is to be exercised. Thus the testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due to him (q). So a person may be made executor for one particular thing only, as touching such a statute or bond, and no more (r). And

3. Limitations
as to the sub-
ject-matter.

(n) Swinb. Pt. 4, s. 18, pl. 1. Godolph. Pt. 2, c. 2, s. 3. Wentw. Off. Ex. 29, 14th edition. Spratt v. Harris, 4 Hagg. 408, 409.

(o) Swinb. Pt. 4, s. 18, pl. 4.

(p) Spratt v. Harris, Toller, 36. 4 Hagg. 408, 489. Where a testator appointed a man who was resident in Portugal, to be his executor "in Portugal," it was held that the words "in Portugal" were equivalent to "for Portugal," and that such executor was not entitled to probate in this country : Velho v. Leite, 3 Sw. & Tr. 456. Again, Where W. made a Will in England in 1861, and appointed B. and C. executors thereof, and in May, 1863, being in India, he made a codicil, and on the 9th of June executed a paper, whereby he appointed E. & F. "my executors in this country : " The Court held that the context of the paper, giving the testator's reasons for the appointment of E. and F., showed that he did not mean them to have any power over his property in England, and granted probate to B. and C. without reserving power to E. and F. : In the goods of Wallich, 3 Sw. & Tr. 423. If

power had been reserved of making a similar grant to them, this, it would seem, would not affect the validity of the probate. In the goods of Pulman, 3 Sw. & Tr. 269. But where a testator executed two Wills, one disposing of property in Tasmania, and appointing executors resident in Tasmania ; the other disposing of property in England, and appointing three executors distinct from those appointed in the other Will, the Court granted probate to issue of both Wills as together containing the Will of the testator. In the goods of Harris, L. R. 2 P. & D. 83.

(q) Dyer, 4, a. Wentw. Off. Ex. 29, 14th edition. Godolph. Pt. 2, c. 3, pl. 2, 3.

(r) Wentw. Off. Ex. 29, 14th edition. Davies v. Queen's Proctor, 2 Robert. 413. But when the testator said, "I make my wife my full and whole executrix of all my cattle, corn, and movable goods," and said nothing of what should be done with the residue of his estate, as leases and debts, Jones and Croke, Justices, held that she was sole and absolute executrix for the whole estate, as well leases and

In a case where an executor was appointed, provided he proved the Will within three calendar months next after the death of the deceased, it was held, that, in computing the time, the day of the death was to be excluded (z). But if he fails to prove the Will within three months, his appointment is void (at all events if there be substituted executors), though the failure were through the inadvertence of his solicitor, and though he has acted in the execution of the trust of the Will (a).

It is not thought expedient to go further into the law of conditional appointments of executors, which the reader will find fully discussed in Swinburne (b) and Godolphin (c). The parts of the subjects which seem necessary to be introduced into this Treatise will be found subsequently, when conditional legacies are considered (d).

(z) In the goods of Wilmot, 1 ante, p. 196, note (n).

Curt. 1.

(b) Pt. 4, s. 5—16.

(a) In the goods of Day, 7 Notes

(c) Pt. 1, c. 13, 14. Pt. 2, c. 2.

of Cas. 553. See also In the goods of Lane, 33 L. J., P. M. & A. 185,

(d) Post, Pt. III. Bk. III. Ch. II. § VI.

CHAPTER THE FOURTH.

IN WHAT CASES THE APPOINTED EXECUTOR MAY TRANSMIT
HIS APPOINTMENT.

ALTHOUGH the executor cannot assign the executorship (a), yet the interest vested in him by the Will of the deceased may, generally speaking, be continued and kept alive by the Will of the executor; so that if there be a sole executor of A., the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (b). But if the first executor dies intestate, then his administrator is not such a representative, but an administrator *de bonis non* of the original testator must be appointed by the Court of Probate (c); for the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator: But the administrator of the exe-

1. Where there is a sole executor, his executor represents the first testator:

but his administrator does not:

(a) *Bedell v. Constable*, Vaugh. 182.

(b) Com. Dig. tit. Administration (G) tit. Administration (B. 6). Touchst. 464. Stat. 25 Edw. III. st. 5, c. 5. Wentw. Off. Executor, 461, 14th edition. 2 Bl. Comm. 506. The rule is the same, though the original probate was a limited one: In the goods of Beer, 2 Robert. 349. See *post*, Pt. III. Bk. I. Ch. III. as to whether a power given to an executor is transmissible to his executor.

(c) Bro. Abr. Administrator,

pl. 7. Com. Dig. Administrator (B. 6). 2 Bl. Comm. 506. See in the goods of Martin, 3 Sw. & Tr. 1. In the goods of Bridger, 4 P. D. 77. Thus it was held that the administratrix of an executrix could not sue for the double value of lands held over, after notice to quit under a demise from the testator, contrary to stat. 4 Geo. II. c. 28, without taking out administration *de bonis non*, even though the tenant had attorned to her: *Tingrey v. Brown*, 1 Bos. & Pull. 310.

Ch. IV.] Tra

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executor is merely the officer of the Court of Probate and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator (*d*).

If the first executor should die, without having proved the Will (*e*), the executorship is not transmissible to his executor, but is wholly determined, and an administrator *cum testamento annexo* must be appointed (*f*). Hence it follows that if the person appointed executor dies before the testator there must be administration *cum testamento annexo* (*ff*).

A married woman, being executrix, might, even before the Married Women's Property Act, continue the chain of representation, by making her own executor (*g*).

In *Barr v. Carter* (*h*), Elizabeth Chapman, a married woman, made a Will, merely executing a power given her by the marriage settlement, but she also went on to appoint Elizabeth Carter sole executrix of that her Will: She died in the lifetime of her husband; and the Ecclesiastical Court granted probate of this Will in the general form: the Testatrix was herself the executrix of a former husband, Thomas Hawley: And it was held that the general probate of her

the executor of the executor does not represent the first testator, unless the first executor proves the Will.

Transmission of executorship by a feme covert executrix.

(*d*) ? Bl. Comm. 506. However, the administrator *durante minore etate* of the executor of an executor is the representative of the first testator; for such an administrator is *loco Executoris*: Anon. 1 Freem. 287. *Contra*, Limmer v. Every, Cro. Eliz. 211, as cited by C. B. Gilbert, in Bac. Abr. Executors (B. 8). But see Mr. Smirke's note, in his valuable edition of Freeman.

(*e*) But if administration *cum testamento annexo* has been granted under his letter of attorney for his use or benefit to another, it is the same thing as if he had proved the Will himself: In the goods of Bayard, 1 Robert. 769. S. C. 7

Not. Cas. 117, and a grant to the attorney of an executor does not break the chain of representation. In the goods of Murguia, 9 P. D. 236.

(*f*) Isted v. Stanley, Dyer, 372 a. Hayton v. Wolfe, Cro. Jac. 614. Wentw. Off. Ex. 82, 14th edit. Day v. Chatfield, 1 Vern. 200. Wankford v. Wankford, 1 Salk. 308. Anon. 3 Salk. 21.

(*ff*) Brown v. Poyns, Sty. 147. Pullen v. Sergeant, 11 Chan. Rep. 300.

(*g*) Birkett v. Vandercom, 3 Hagg. 750, *ante*, p. 47.

(*h*) 2 Cox, 429.

Will transmitted the representation to Elizabeth Carter, so as to make her the personal representative of the first testator Thomas Hawley (i).

If there are several executors, no interest is transmissible, except to the executor of the survivor.

If there are several executors appointed, and one of them dies, leaving one or more of his co-executors living, no interest in the executorship is transmissible to his own executor, but the whole representation survives, and will be transmitted ultimately to the executor of the surviving executor, unless he dies intestate. Thus, if A. makes B. and C. executors, then B. makes J. S. executor and dies, and afterwards C. dies intestate, the executor of B. shall not be executor of A., because the executorship wholly and solely vested in C. by the survivorship; and so administration *de bonis non* shall be committed (j).

The law was formerly the same where there were several executors, and one alone proved the Will, and the rest renounced before the Ordinary; there, upon the death of him who proved, no interest was transmitted to his executor, if any of those who refused were surviving (k). But the law is altered in this respect by the Court of Probate Act, 1857, s. 79 (l).

The conditions under which the chain of executorship is broken in law have been thus tersely enumerated in a recent edition of a Text-book on Probate Practice (m):—

1. When the immediate sole acting executor dies intestate or testate without appointing an executor.

2. When the survivor of the immediate acting executors dies intestate.

(i) But a limited probate will not continue the chain of representation: In the goods of Bayne, 1 Sw. & Tr. 132. The practice of granting limited probate in the case of Wills of married women has since the Married Women's Property Act, 1882, been altered and probate in the general form will now be granted (see *ante*, p. 53, note (a)), and it would seem,

that in such case, the representation would be unbroken.

(j) Wentw. Off. Ex. 215, 14th edition. In the goods of Smith, 3 Curt. 31.

(k) Arnold v. Blencowe, 1 Cox, 426.

(l) See *post*, p. 233.

(m) Tristram & Coote's Probate Practice, 10th ed. p. 173.

3. When the executorship h
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1 Jan., 1858, 1

3. When the remote sole acting executor to whom an executorship has been transmitted downwards, *per catenam*, dies intestate.

4. When the survivor of the remote acting executors dies intestate.

5. When the remote executor or executors renounce the probate of their own testator's Will or have been cited and do not appear.

6. When the remote executor or executors die without having proved their own testator's Will.

7. When of two or more executors who have died after probate taken by them, it is impossible to show which survived the other or others.

8. When one of the executors, having renounced before 1 Jan., 1858, has survived the other executor or executors.

CHAPTER THE FIFTH.

OF AN EXECUTOR DE SON TORT.

HAVING thus considered the appointment of executors by legal means, it remains to treat of a class who are in some sort regarded as executors, but who assume the office by their own intrusion and interference.

An executor
de son tort.

If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong, or more usually, an executor *de son tort* (a).

What acts constitute an executor de son tort.

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. Thus it is said in Dyer, *in margine* (b), that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship *de son tort*. So in one case the taking a Bible, and in another a bedstead (c), were held sufficient, inasmuch as they were the *indicia* of the person so interfering being the representative of the deceased (d). So if a man kills the cattle (e), or uses or gives away, or sells any of the goods (f), or if he takes the goods

(a) The definition of an executor *de son tort*, by Swinburne, Godolphin, and Wentworth, is in the same words, viz., "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [Ecclesiastical] Court to administer;" Swinb. Pt. 4, s. 23, pl. 1. Godolph. Pt. 2, c. 8, s. 1.

Wentw. Off. Ex. c. 14, p. 320, 14th edition. But the term is, in the older books, sometimes applied to a lawful executor, who mal-administers; as by the Lord Dyer, in *Stokes v. Porter*, Dyer, 167, a.

(b) P. 166, b.

(c) Robin's case, Noy, 69.

(d) Toller, 38.

(e) Godolph. Pt. 2, c. 8, s. 4.

(f) Read's case, 5 Co. 33, b.

Ch. v.]

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Padget v. Priest,
Godolph. Pt. 2, c.
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(g) Godolph. P.
Swinb. Pt. 4, s. 2

(h) Wentw. Off.
323, 14th edition.

c. 8, s. 1. Swinb.

(i) Godolph. P.

And see 2 Prest. c.

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also Bac. Abr. Ex.
(k) Kenrick v.

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(l) Anon. Dyer,
Off. Ex. c. 14, p. 3

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to satisfy his own debt or legacy (*g*): or if the wife of the deceased takes more apparel than she is entitled to, she will become executrix *de son tort* (*h*). So there may be a *tort* executor of a term for years: as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate (*i*): though with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry (*k*). And if he that has from the Ordinary letters *ad colligendum*, sell or dispose of any goods, though otherwise subject to perishing, it makes him executor of his own wrong; even though, by the letters *ad colligendum*, he be warranted thereunto; for the judge himself may not do so (*l*).

Again, if a man demands the debts of the deceased, or makes acquittances for them, or receives them (*m*), he will become executor *de son tort*. In the case of *Padget v. Priest* (*n*), it was held, that if a man's servant sells the goods of the deceased, as well after his death as before, by the directions of the deceased given in his lifetime, and pays the money, arising therefrom, into the hands of his master,

Padget v. Priest, 2 Term Rep. 97. Godolph. Pt. 2, c. 1, s. 1. Swinb. Pt. 4, s. 23: So if he gives them away to the poor: *Dyer*, 166, *b*. in marg.

(*g*) Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23.

(*h*) Wentw. Off. Ex. c. 14, p. 323, 14th edition. Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23.

(*i*) Godolph. Pt. 2, c. 8, s. 5. And see 2 Preat. on Convey. p. 319 *et seq.* Where the entry of the wrongdoer is general, he is a disseisor of the fee-simple, and not an executor *de son tort*: *Ibid.* See also Bac. Abr. Executors (B. 3), 1.

(*k*) *Kenrick v. Burgess*, Moor. 126.

(*l*) *Anon. Dyer*, 256, *a*. Wentw. Off. Ex. c. 14, p. 324, 14th edition.

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Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23. In what cases the mere taking possession of the goods of the deceased will or will not create an executorship *de son tort*, see *Read's case*, 5 Co. 33, *b*. 1 Roll. Ab. 918, pl. 5. Wentw. Off. Ex. 327, 14th edition. Swinb. Pt. 6, s. 22, pl. 2. *Serle v. Waterworth*, 4 M. & W. 9, *post*, p. 213. Some possession is colourable, and still none in law to charge, &c., as in the case of an overseer or supervisor (see *ante*, pp. 193, 194), or one who is made executor by a Will, which is afterwards disapproved by the proving of one later; *Dyer*, 166, *b*.

(*m*) Godolph. Pt. 2, c. 8, s. 1. Swinb. Pt. 4, s. 23.

(*n*) 2 T. R. 97.

this makes the master, as well as the servant, executor *de son tort*. And it seems to be established that the agent of an executor *de son tort* collecting the assets, with a knowledge that they belong to the testator's estate, and that his principal is not the legal personal representative, may himself be treated as an executor *de son tort* (o).

So if a man *pays* the debts of the deceased, or the fees about proving his Will, this will constitute him executor *de son tort* (p); but it is otherwise if he pays the debts or fees with his own money (q).

Living in the house, and carrying on the trade of the deceased (a victualler), was held a sufficient intermeddling to make the defendant executor *de son tort*, notwithstanding his wife (the daughter of the deceased) proved the Will after the action was commenced, and she and her husband were acting together, and were in the house before the death of the testator (r).

Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him executor *de son tort* (s).

With respect to fraud, by the statute 43 Eliz. c. 8, after reciting that "forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others by their means do take deeds of gifts and authorities by letter of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and so the creditors for lack of know-

(o) *Sharland v. Mildon*, 5 Hare, 468.

(p) *Godolph. Pt. 2, c. 8, s. 1.*

Swinb. Pt. 6, s. 22.

(q) *Ibid.* Went. Off. Ex. 326,

14th edition.

(r) *Hooper v. Summarsett*, Wightw. 16.

(s) *Godolph. Pt. 2, c. 8, s. 1.*

Com. Dig. Administrator (C. 1).

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(t) See *Godol*
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(u) *Godolph.*

ledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts," it is enacted "that every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate upon any fraud as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate, at the time of his decease,) shall be charged and chargeable as executor of his own wrong (t); and so far only as such goods and debts coming to his hands, or whereof he is released or discharged by such administrator will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

So, if in his lifetime the deceased made a deed of gift, or bill of sale, of all his goods and chattels to another, in fraud of his creditors, and the donee after the death of the donor disposes of these goods and chattels, by these means he shall be executor in his own wrong (u).

When the Will is proved, or administration granted, and another person then intermeddles with the goods, this shall

(t) See Godolph. Pt. 2, c. 8, s. 2. 1 Sid. 31, pl. 9. 1 Roll. Abr. 549. Swinb. Pt. 4, s. 23. Kitchen v. (C. 1), pl. 3. Stamford's case, 2 Dixon, Goldsb. 116, pl. 12. 2 H. Leon. 223. Hawes v. Leader, Cro. Bl. 26, n. (b). Jac. 271. Edwards v. Harben, 2

(u) Godolph. Pt. 2, c. 8, s. 1. T. R. 587.

not make him executor *de son tort*, by construction of law, because there is another personal representative of right against whom the creditors can bring their actions; and such a wrongful intermeddler is liable to be sued as a trespasser (*x*). But, though there be a lawful executor or administrator, yet if any other take the goods *claiming them as executor*, or pays debts or legacies, or intermeddles *as executor*, in this case, because of such express claiming to be executor, he may be charged as executor of his own wrong, although there were another executor of right (*y*).

But there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation (*z*), directing the funeral, in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects (*a*), making

What acts do
not make a
man executor
de son tort.

(*x*) Anonymous, 1 Salk. 313. Godolph. Pt. 2, c. 8, s. 3: but one who gets the goods of the testator into his hands may be sued as executor *de son tort*, although afterwards and before the writ brought, administration be legally granted to another: *Ibid.* Kellow v. Westcombe, 1 Freem. 122.

(*y*) Read's case, 5 Co. 34, *a*. Went. Off. Ex. 326, 14th edition. Godolph. Pt. 2, s. 1. Swinb. Pt. 4, s. 23. Com. Dig. Administrator (C. 1). However, this was denied at N. P. in Hall v. Elliott, Peake, N. P. C. 87, by Lord Kenyon, who said it was impossible there should be a lawful executor, and an executor *de son tort*, at the same time. Observations to the same effect were also made by Sir T. Plumer, M.R., in Tomlin v. Beck, 1 Turn. & R. 438, where his Honor held, that a person who was permitted by an executor to possess himself

of part of the assets of a testator, and who, after the executor's death, and when there was no legal representative, either of the testator or the executor, retained the assets, and acted in the execution of the trusts of the Will, was not executor *de son tort* to the original testator.

(*z*) Godolph. Pt. 2, c. 8, s. 6. So if one do but take a horse of the deceased, and tie him in his own stable: Godolph. Pt. 2, c. 8, s. 3. Wentw. Off. Ex. 385, 14th edition.

(*a*) Dyer, 166, *b*. in margin. Fitzh. Executors, pl. 24. 1 Roll. Abr. 918, Executors (C. 2), pl. 4. Wentw. Off. Ex. c. 14, p. 323, 14th edition. Godolph. Pt. 2, c. 8, s. 6. Harrison v. Rowley, 4 Ves. 216. So where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor

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an inventory
repairing his
children (*d*):
charity (*e*).

In the case
hairdresser, c.
1896, continuing
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It was held, in
that this was
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(*b*) Godolph. Pt. 2, c. 8, s. 6.
(*c*) Godolph. Pt. 2, c. 8, s. 3.
(*d*) Godolph. Pt. 2, c. 8, s. 3.
(*e*) Swinb. Pt. 4, s. 23.
Abr. tit. Executors
43.

(*f*) 4 Mees. &
(*g*) The defence
that one Joseph
fore and at the time
was indebted to
24l. for goods sold
due to the plaintiff
the making of
declaration mentioned
plaintiff, after the

an inventory of his property (b), feeding his cattle (c), repairing his houses, or providing necessaries for his children (d) : for these are offices merely of kindness and charity (e).

In the case of *Serle v. Waterworth* (f), the widow of a hairdresser, one Joseph Waterworth, who died in October, 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold : In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued : On January 3rd, 1837, on the application of a creditor, to whom Joseph Waterworth, at the time of his death, owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date : In March, she took out administration : It was held, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort* (g).

de son tort ; unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased ; which is a question for the jury : *Camden v. Fletcher*, 4 Mees. & W. 378.

(b) Godolph. Pt. 2, c. 8, s. 6.

(c) Godolph. Pt. 2, c. 8, s. 8.

(d) Godolph. Pt. 2, c. 8, s. 6.

(e) Swinb. Pt. 2, s. 23. Bac. Abr. tit. Executors (B. 3), 1 Toller 41.

(f) 4 Mees. & W. 9.

(g) The defendant had pleaded that one Joseph Waterworth, before and at the time of his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the note in the declaration mentioned ; that the plaintiff, after the death of Joseph,

applied to the defendant for payment ; whereupon in compliance with his request, the defendant, after the death of Joseph, for and in respect of the death so remaining due to the plaintiff as aforesaid and for no other consideration whatever, made and delivered the note to the plaintiff ; and that Joseph died intestate, and that at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid ; and the plea then averred that there never was any consideration for the said note except as aforesaid : The Barons of the Exchequer held, after verdict for the defendant, that the plea was no answer to the declaration,

If another man takes the goods of the deceased, and sells or gives them to me, this shall charge him as executor of his own wrong, but not me (*h*). Accordingly, where a lessee died intestate during the term, and his widow entered, without taking administration, and paid rent, and afterwards her son-in-law took the premises, with her concurrence and with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term; it was held that he could not be considered as assignee in law of the lease; for though the widow might have been chargeable as executrix *de son tort*, he had not made himself executor *de son tort* by taking the premises from her (*i*).

Again, if a person sets up in himself a colourable title to the goods of the deceased, as where he claims a lien on them, though he may not be able to make out his title completely, he shall not be deemed an executor *de son tort* (*k*). So if a man lodge in my house, and die there, leaving goods therein behind him, I may keep them, until I can be lawfully discharged of them, without making myself chargeable as executor in my own wrong (*l*). Or if I take

inasmuch as it did not negative every consideration for the promissory note, for that it did not allege there were no assets; and the effect of giving the note was, at all events, to preclude the plaintiff, for a year, from suing the defendant, in case she should afterwards take out administration, which was a sufficient consideration for the giving of the note: But this decision was afterwards overruled in the Exchequer Chamber: *Nelson v. Serle*, 4 M^c & W. 795.

(*h*) Godolph. Pt. 2, c. 8, s. 1. Com. Dig. Administrator (C. 2). It might be otherwise, if a case of collusion could be made out, and possibly he might be sued in Equity, *Hill v. Curtis*, L. R. 1 Eq.

90. See also stat. 43 Eliz. c. 8, *ante*, pp. 210, 211. The executor of an executrix *de son tort* is not liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled: *Wilson v. Hodson*, L. R. 7 Ex. 84; unless indeed the executor *de son tort* was guilty of a devastation so as to bring the case within, 30 Car. II. c. 7, s. 2, *ib*.

(*i*) *Paull v. Simpson*, 9 Q. B. 363, *Comp. Williams v. Heales*, L. R. 9 C. P. 177.

(*k*) *Flemings v. Jarrat*, 1 Esp. N. P. C. 336.

(*l*) Godolph. Pt. 2, c. 8, s. 3. *Swinb. Pt. 4, s. 23. Com. Dig. Administrator (C. 2).*

the goods of the own, this will

Likewise, a deceased, and executor, can But, although while he acts several executors to act after as executor of another of tered (*o*).

In *Beavan* died intestate property there obtained reprob Belgian Law all the debts of the assets to this country in England intestate obtained England: A

(*m*) *Ibid*.

(*n*) *Hall v. El* 87. A person goods of a testators executors who the Will, cannot executor *de son tort* L. R. 5 C. P. held, however that the goods sent of a person's administration was *Parsons v. M* 152; But in *E* 1 Eq. 90, it V.-C., that wh

the goods of the deceased by mistake, supposing them to be my own, this will not make me executor of my own wrong (*m*).

Likewise, a man who possesses himself of the effects of the deceased, under the authority of and as agent for the rightful executor, cannot be charged as executor *de son tort* (*n*). But, although a person cannot, therefore, be charged as such while he acts under a power of attorney, made by one of several executors who has proved the Will, yet if he continues to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved or administered (*o*).

In *Beavan v. Lord Hastings* (*p*), an Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him *pur et simple*, which by the Belgian Law imposed upon him a personal obligation to pay all the debts of the intestate independently of the amount of the assets: The intestate's brother afterwards returned to this country, but did not take possession of any property in England belonging to the intestate: A creditor of the intestate obtained letters of administration to him in England: And it was held by Wood, V.-C., that he could

(*m*) *Ibid.*

(*n*) *Hall v. Elliott, Peake, N. P. C.* 87. A person who deals with the goods of a testator, as agent of executors who afterwards prove the Will, cannot be treated as executor *de son tort*. *Sykes v. Sykes*, L. R. 5 C. P. 113. It has been held, however, to be no defence that the goods were taken by consent of a person to whom administration was afterwards granted: *Parsons v. Mayesden*, 1 Freem. 152; But in *Hill v. Curtis*, L. R. 1 Eq. 90, it was held by Wood, V.-C., that where A. took possession

of goods as the agent of B. and by his order, and B. afterwards took out administration, the agency and order prevented the act of A. from being the act of an executor *de son tort*; for that the tort of B. was purged by his becoming administrator, and his order became rightful *ab initio*, so that the agent's act was also purged. But see *post*, p. 220, note (*r*).

(*o*) *Cottle v. Aldrich*, 4 Maule & Selw. 175. But see *Tomlin v. Beck*, *ante*, p. 212, note (*y*).

(*p*) 2 Kay & J. 724.

not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. His Honor held also that the intestate's brother, as he had not taken possession of any of the English property of the intestate, was not an executor *de son tort*.

Question whether man is executor *de son tort* one of law; whether he did certain acts question of fact.

Liability of executor *de son tort*;

The question whether executor *de son tort*, or not, is a conclusion of law, and not to be left to a jury: whether the party did certain acts is indeed a question for a jury; but when these facts are established, the result from them is a question of law (*q*).

When a man has so acted, as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased (*r*), or by a legatee (*s*): for an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor (*t*).

in an action or suit by a cre-

In an action by a creditor he shall be named executor

(*q*) Padget v. Priest, 2 T. R. 99.

(*r*) Godolph. Pt. 2, c. 8, s. 2. On this ground, in a case where the defendant acted as executor, but did not take out probate till sixteen years after the testator's death, the Lord Chancellor (Eldon) allowed a plea of the Statute of Limitations; because he might have been sued as executor *de son tort*: Webster v. Webster, 10 Ves. 93. See also Coote v. Whittington, L. R. 16 Eq. 534, from which case it appears that an executor *de son tort* is liable to an account in Equity for such assets as he has received, and so far as you can state that he has received a particular asset, but he is not liable to a general account unless he has received everything. In such an action the personal representative is not a necessary

party. As to the personal representative being a necessary party in an administration action, see *post*, Pt. v. Bk. II. Ch. 2.

(*s*) 1 Roll. Abr. 910, Executors (F.), pl. 1. Bac. Abr. Executors (B, 3), 3.

(*t*) Carmichael v. Carmichael, 2 Phill. C. C. 103, *per* Lord Cottenham. Rayner v. Koehler, L. R. 14 Eq. 262; Coote v. Whittington, L. R. 16 F. 534. But see Cary v. Hills, L. R. 15 Eq. 79. Notwithstanding the above dictum of Lord Cottenham, an executor *de son tort* can discharge himself by accounting to the rightful executor, although one executor cannot discharge himself by accounting to a co-executor, Hill v. Curtis, L. R. 1 Eq. 90-98.

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generally (*u*); strangers cannot sue the executor of the deceased not yet proved that if a man debt of the or that he is only executor. If may be joined wise, if there joined in a suit

And if the e should plead joined, this iss constitute in la against him, a plaintiff do recd assets of the t not, then out of

However, th own wrongful a all acts not for do. And, acco beyond the ext Therefore, in a a plea of plene

(*u*) Coulter's ca Godolph. Pt. 2, c. 265, note (2) to O

(*v*) 2 Black. Cor possession and occ dling with the goo gives notice to they are to sue the Lord Dyer, v c. 14, 322, 14th ed

(*r*) Meyrick v. Q. B. 719.

(*y*) Wentw. Off.

generally (u); for the most obvious conclusion which strangers can form from his conduct is, that he has a Will of the deceased, wherein he is appointed executor, but has not yet proved it (v). And accordingly it has been held (x), that if a man be sued as the executor of an executor for a debt of the original testator, it is no answer to the action, that he is only executor *de son tort* to the original rightful executor. If there should be also a lawful executor, they may be joined in the suit, or sued severally: but it is otherwise, if there be a lawful administrator, for he cannot be joined in a suit with the executor *de son tort* (y).

And if the executor *de son tort*, being sued by a creditor, should plead *ne unques executor*, on which issue should be joined, this issue, on proof of acts by the defendant, such as constitute in law an executorship *de son tort*, would be found against him, and the judgment thereon would be, that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator if the defendant have so much, but if not, then out of the defendant's own goods (z).

However, though an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit, which a rightful executor may do. And, accordingly, if he pleads properly, he is not liable beyond the extent of the goods which he has administered (a). Therefore, in an action by a creditor of the deceased, under a plea of *plene administravit*, he shall not be charged beyond

ditor of the deceased or a party beneficially interested in his estate.

Lawful executor and executor *de son tort* may be sued jointly or severally: lawful administrator cannot be joined with executor *de son tort*.

Executor *de son tort* protected in all acts not for his own benefit which rightful executor may do.

(u) Coulter's case, 5 Co. 31, a. Godolph. Pt. 2, c. 8, s. 2. 1 Saund.

265, note (3) to Osborne v. Rogers.

(v) 2 Black. Comm. 507, 8. The possession and occupation, or meddling with the goods, is that which gives notice to creditors whom they are to sue as executor: By the Lord Dyer, Wentw. Off. Ex. c. 14, 322, 14th edition.

(z) Meyrick v. Anderson, 14 Q. B. 719.

(y) Wentw. Off. Ex. p. 328, 14th

edition. Godolph. Pt. 2, c. 8, s. 2. Com. Dig. Administrator (C. 3). There cannot be an administrator *de son tort*: the law knows no such appellation: Godolph. Pt. 2, c. 8, s. 2.

(z) Wentw. Off. Ex. c. 14, pp. 331, 332, 14th edition. 1 Saund. 336, b. note (10) to Hancock v. Prowd. Hooper v. Summersett, Wightw. 19, by Thompson, B.

(a) Godolph. Pt. 2, c. 8, s. 2. Wentw. Off. Ex. 331, 14th edition.

the assets which came to his hands (*b*): and in support of this plea, he may give in evidence the payments by himself of just debts of the deceased, of equal or superior degree to that on which the action is brought, which have exhausted such assets (*c*). So even after action brought, he may apply the assets, which are in his hands, to the payment of a debt of superior degree, and plead such payment in bar of the action (*d*). So he may give in evidence, under the same plea, that he has delivered the assets to the rightful executor or administrator before action brought (*e*). An executor *de son tort* may well plead *ne unques executor* and also *plene administravit*, and, although on the former issue he should be unsuccessful, he may have a verdict on the latter (*f*).

But it is no defence either under a plea of *plene adminis-*

(*b*) Dyer, 166, *b*. in margin. 1 Saund. 265, note (2) to Osborne v. Rogers. Hooper v. Summersett, Wightw. 21, *per curiam*. Yardley v. Arnold, Carr. & M. 434.

(*c*) Wentw. c. 14, pp. 333, 334, 14th edition. Mountford v. Gibson, 4 East, 454, in the judgment of Le Blanc, J., 2 Black. Comm. 508. Bac. Abr. Executors (B. 3), 2.

(*d*) Oxenham v. Clapp, 2 Barn. & Adol. 309. See further, *post*, Pt. III. Bk. II. Ch. II. § III.

(*e*) Anon. 1 Salk. 313. Padget v. Priest, 2 T. R. 97, in the judgments of Ashurst, J., and Buller, J. Curtis v. Vernon, 3 T. R. 590, in Lord Kenyon's judgment. Hill v. Curtis, *post*, p. 213, note (*k*). In Samuel v. Morris, C. C. & P. 620, which was an action of trover, the plaintiff had pledged the goods in question to a parish pauper for a debt: On the pauper's death, the defendants, who were the parish overseers, took the goods, together with those of the pauper, in order to pay the expenses of his funeral;

When the bill for the coffin was brought in by one Joseph, who had made it by their order, they proposed that he should have all the goods, to make what he could of them, if he would pay the rent due to the landlord of the house in which the pauper had lived, and all the funeral expenses: To this proposal Joseph assented, and took the goods and sold them: And Parke, B., held, that although the defendants, by taking the goods on the death of the pauper, had made themselves executors *de son tort*, yet as the jury found that the agreement with Joseph amounted to a transfer of the office, and not to a sale of the goods to him by the defendants, they were not liable to the plaintiff, because, he being a pawnor of the goods, a mere seizure of them did not amount to conversion.

(*f*) Hooper v. Summersett, Wight. 20, by Wood, B.

travit, or a *plene* plea pleaded, the rightful executor, in fact, no adm action was brought *de son tort*, by an intestate's estate after the intestate's death, the defendant, we And it has been held that an executor *de son tort* set up as a defendant, and accounted for the assets and paid over the same, cannot, by setting himself from the testator's estate, be liable as executor *de son tort*, by showing that he is the principal; for

(*g*) Curtis v. Vernon, 3 T. R. 590. S. C. affirmed, 18 Black. 18. The court held that the credit should be put into a verdict, and would have to be action against the executor: Oxenham v. Clapp, 2 Barn. & Adol. 315.

(*h*) Curtis v. Vernon, 3 T. R. 590.

(*i*) Layfield v. Seton, 172. But see 1 Eq. 90, Seton 886.

(*k*) Carmichael v. Phillips, C. C. 10. But this was by Wood, V.-C.

travit, or a special plea, that *after* action brought, and before plea pleaded, the defendant delivered over the assets to the rightful executor or administrator (g) : not even, though, in fact, no administration was granted to any one till after the action was brought (h). So payments made by an executor *de son tort*, pending a suit in equity for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, were not allowed (i).

And it has been said that a man who is sued in equity as executor *de son tort*, jointly with the rightful executor, cannot set up as a defence that he had, even *before* the bill was filed, accounted for his receipts and payments to his co-defendant, and paid over the balance ; for that an executor *de son tort* cannot, by settling with the personal representative, discharge himself from liability to the parties beneficially interested in the testator's estate (k). So the agent or an executor *de son tort*, who has, by collecting the assets, made himself also liable as executor *de son tort*, cannot discharge himself by showing that he has duly accounted for his receipts to his principal ; for the rule that the receipt of the agent is the

(g) *Curtis v. Vernon*, 3 T. R. 567. S. C. affirmed in Error, 2 H. Black, 18. The reason seems to be that the creditor would thereby be put into a worse situation ; he would have to bring a second action against the rightful executor : *Oxenham v. Clapp*, 2 B. & Adol. 315.

(h) *Curtis v. Vernon*, 3 Tr. 587. 3 H. Bl. 18.

(i) *Layfield v. Layfield*, 7 Sim. 172. But see *Hill v. Curtis*, L. R. 1 Eq. 90, Seton on Decrees, 4th ed. 886.

(k) *Carmichael v. Carmichael*, 2 Phill. C. C. 101, *per* Lord Cottenham. But this *dictum* was doubted by Wood, V.-C., in *Hill v. Curtis*,

L. R. 1 Eq. 90 : Lord Cottenham appears to have been influenced by the reasoning that even the rightful executor cannot discharge himself by settling accounts with a co-executor : But Wood, V.-C., pointed out the reason for this, viz., that a rightful executor is bound to *administer* the assets which he receives, and it is not enough simply to hand them over to his co-executor : But an executor *de son tort* is not so bound ; and may discharge himself by showing that he has delivered the assets to the rightful executor before action brought. *Ante*, pp. 215, 218.

receipt of the principal does not apply to the case of a wrong-doer (*l*).

Executor *de son tort* cannot plead a retainer for his own debt :

even though debt is of superior degree :

or though rightful executor or administrator assent to retainer :

but he may retain if afterwards he obtain administration.

An executor *de son tort* cannot give in evidence, under *plene administravit*, or specially plead, a retainer for his own debt: for otherwise the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him (*m*). And it will make no difference though the debt due to the executor *de son tort* be of a superior degree to that of the creditor who brings the action against him (*n*): Nor though the rightful executor or administrator has assented to such retainer (*o*). If the executor *de son tort* should plead the retainer to satisfy his own debt, the plaintiff, though he had sued the defendant as executor generally, may reply, that he is executor *de son tort* (*p*). If he attempts to give the retainer in evidence, under *plene administravit*, the plaintiff must show the Will, and who are the rightful executors (*q*).

Yet if an executor *de son tort* afterwards, even *pendente lite*, obtains administration, he may retain; for it legalises those acts which were tortious at the time (*r*). And, therefore, if subsequently to the replication that he is executor *de son tort*, he obtains administration, he may rejoin that fact by way of plea *puis darrein continuance*; for it is consistent with the retainer in the plea (*s*).

(*l*) *Sharland v. Mildon*, 5 Hare, 469. Unless the executor *de son tort*, subsequently become administrator, *Ibid*: *Hill v. Curtis*, L. R. 1 Eq. 90, 100.

(*m*) *Coulter's case*, 5 Co. 30, a. S. C. Cro. Eliz. 630. Wentw. Off. Ex. c. 14, p. 333, 14th edit.

(*n*) *Curtis v. Vernon*, 2 T. R. 587. 2 H. Bl. 18.

(*o*) *Ibid*.

(*p*) *Alexander v. Lane*, Yelv. 137.

(*q*) *Arnold v. Arnold*, Buller, N. P. 143.

(*r*) *Pyne v. Woolland*, 2 Ventr. 180. *Williamson v. Norwich*, Sty. 337. 1 Saund. 265, note (2), to *Osborne v. Rogers*. But if administration be granted to one after he hath intermeddled wrongfully with the deceased's goods, this will not purge the wrong done before; and, therefore, a creditor may sue him as executor *de son tort*, or as a lawful administrator, at his election: *Laury v. Aldred*, 2 Brownl. 185. *Godol' h. Pt. 2*, s. 2.

(*s*) *Arnold v. Arnold*, Buller, N. P. 143.

With respect to the suit of the several authorities administrator executor *de son tort* issue, and in the rightfu ground, that the re-couped in de administrator w it cannot be co were made by executor *de son tort* the rightful ex &c., to the valu in satisfaction o proved, under t executor *de son tort* sought to be r the lawful exec but will still be And in the cas

1108. S. C. And 265, note (2), to Os but see Whitehe Freem. 265.

(*l*) *Padget v. 1* 109, by Buller, J. Gilson, 4 East, 45 J. 2 Black. Cor Abr. Exors. (B. Chambers, 9 M. Lord Abinger. I N. P. 48, that pe he could not give ment of debts to goods as were stil onl- s. 2

With respect to the liability of an executor *de son tort* at the suit of the lawful representative of the deceased, there are several authorities to show, that if the rightful executor or administrator bring an action of trover or trespass, the executor *de son tort* may give in evidence, under the general issue, and in mitigation of damages, payments made by him in the rightful course of administration (*t*): upon this ground, that the payments which are thus, as it is termed, *re-couped* in damages, were such as the lawful executor or administrator would have been bound to make; and, therefore, it cannot be considered as any detriment to him, that they were made by an executor *de son tort* (*u*). But the executor *de son tort* cannot *plead*, in bar to an action by the rightful executor or administrator, payments of debts, &c., to the value of the assets, or that he has given the goods in satisfaction of the debts (*x*); and, although the payments proved, under the general issue, to have been made by the executor *de son tort* amount to the full value of the goods sought to be recovered in the action of trespass or trover, the lawful executor or administrator shall not be nonsuited, but will still be entitled to a verdict for nominal damages (*y*). And in the case of *Woolley v. Clark* (*z*), a Will was proved

His liability in an action by the rightful executor.

1108. S. C. Andr. 328. 1 Saund. 263, note (2), to *Osborne v. Rogers*; but see *Whitehead v. Sampson*, 1 Freem. 265.

(*t*) *Padget v. Priest*, 2 T. R. 100, by Buller, J. *Mountford v. Gibson*, 4 East, 454, by Le Blanc, J. 2 Black. Comm. 508. Bac. Abr. Exors. (B. 3), 1. *Fyson v. Chambers*, 9 M. & W. 468, *per* Lord Abinger. It is said in Bull, N. P. 48, that perhaps in trover he could not give in evidence payment of debts to the value of such goods as were still in his custody; but as he had sold:

ford v. Gibson, 4 East, 451.

(*x*) *Whitehall v. Squire*, Carth. 104, by Holt, C.J. 2 Black. Comm. 508. *Elworthy v. Sandford*, 3 Hurl. & C. 336.

(*y*) Anon. 12 Mod. 441. 2 Philipps on Evid. 234, n. 6, 7th edit. The contrary is laid down as to the action of trover, in Buller's *Nisi Prius*, 48; but the authority cited for this position does not support it, and it is, as it seems, incorrect. See *Mountford v. Gibson*, 4 East, 447, by Lord Ellenborough. Roscoe on Evidence, 15th edit. 1110.

(*z*) 5 B. & A. 744.

, in Mount-

by the executor named in it, who, after probate, sold the goods of the testator: At the time of the sale he had notice of a subsequent Will, which was afterwards proved, and the probate of the former Will revoked on citation: whereupon the executor, under the latter Will, brought trover against the executor under the former, for the goods sold: and it was holden, that the action was sustainable to recover the full value, and that the defendant was not entitled, in mitigation of damages, to show that he had administered assets to the amount (a).

Again, this re-couping in damages can only be allowed to the executor *de son tort* in cases where there are sufficient assets to satisfy all the debts of the deceased; for otherwise the rightful executor or administrator would be precluded, not only from giving preference to one creditor over others of equal degree, which is one of the privileges of his office, but also from satisfying his own debt, in priority to all those of equal degree, by way of retainer (b).

It remains to be considered, what effect the acts of an executor *de son tort* may have on the goods of the deceased, with relation to the rightful executor or administrator and the alienee of the executor *de son tort*.

It is laid down in *Coulter's case* (c), that "it is clear that all lawful acts, which an executor *de son tort* doth, are good." So it was said in *Graysbrook v. Fox* (d), by Walsh, *quod alii duo Justiciarii concesserunt*, that if an administrator under a grant which is void (by reason of there being a Will and executor) aliens the goods of the deceased to pay the funeral, or debts, the sale is good and indefeasible. And

(a) It must be observed, that the authorities in favour of the right of an executor *de son tort* to re-coup, in damages, payments made in a due course of administration, were not cited in the argument of this case, nor was the point mentioned: *Ideo quære*, whether it must be understood as

overruling them.

(b) Wentw. Off. Ex. c. 14, p. 333, 14th edit. *Mountford v. Gibson*, 4 East, 453, in the judgment of Lawrence, J. 2 Black. Comm. 507, 8. *Elworthy v. Sandford*, 3 Hurl. & C. 330.

(c) 5. Co. 30 b.

(d) Plowd. 282.

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Lord Holt, in *Parker v. Kett* (e), laid down that a legal act done by an executor *de son tort* shall bind the rightful executor, and shall alter the property; and that the reason is, because the creditors are not bound to seek further than him who acts as executor; therefore, if an executor *de son tort* pays 100*l.* of the testator's in a bag to a creditor the rightful executor shall not have trover against the creditor (f).

But when it is thus generally laid down, that payments made in the due course of administration, by one who is executor *de son tort*, are good, that must be understood of cases where such payments are made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong, in the very instance complained of, by one taking upon himself to hand over the goods of the deceased to a creditor. Thus in *Mountford v. Gibson* (g), the goods in question had originally been sold by the defendant to the intestate in his lifetime; on his death, they not having been paid for, on application to the intestate's widow for that purpose, she delivered them back to the defendant, in satisfaction of his demand: No other acts appeared to have been done by the widow, to show that she had before taken upon herself to act as executrix: The administrator brought trover for the goods against the creditor; on whose behalf it was contended, that he had a right to protect himself in the action under such payment by the widow as executrix *de son tort*: But the Court of King's Bench held, on the ground above stated, that this was no defence. Accordingly in *Thomson v. Harding* (h), it was laid down in the judgment of the same Court that the law is not that as against the true representative every payment from the assets of the deceased shall be valid, if made by a person

(e) 1 Lord Raym. 661. S. C. in *Oxenham v. Clapp*, 1 B. & Ad. 313.
12 Mod. 471.

(f) See also the judgment of Lord
Blanc, J., in *Mountford v. Gibson*,
4 East, 454, and of Littledale, J.,

(g) 4 East, 441.

(h) 2 E. & B. 630.

who has so intermeddled with the property of the deceased as to render himself liable to be sued as executor *de son tort*: But that where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property.

It must further be observed that the act of an executor *de son tort* is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration (*i*).

How far an administrator is bound by his own acts as executor *de son tort*.

Where a man has acted as executor *de son tort*, and afterwards obtains letters of administration, a question may arise, how far he is bound, in his character of rightful administrator, by his own acts done while executor *de son tort*. This subject will be considered hereafter, together with the question as to what may be done by an administrator before letters of administration are granted (*k*).

(*i*) *Buckley v. Barber*, 6 Exch. 164.

(*k*) *Post*, Pt. I. Bk. V. Ch. I. § II.

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(a) *Bac. Abr.* Douglas v. For in the judgmen

(b) *Doyle v. Lef.* 239.

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CHAPTER THE SIXTH.

OF THE EXECUTOR'S REFUSAL OR ACCEPTANCE OF THE OFFICE.

SECTION I.

When and how the office may be refused.

THE office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office (a); and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede (b).

Executors cannot be compelled to accept the office :

But though the executor cannot be compelled to accept the executorship, whether he will or not, yet by stat. 21 Hen. VIII. c. 5, s. 8, the Ordinary might convene before him (c) any person made and named executor of any testament, "to the intent to prove or refuse the testament" and if he neglected to appear, he was, previous to the stat. 53 Geo. III. c. 127, punishable by excommunication for a contempt (d); and might subsequently be dealt with in the mode substituted by that statute, s. 2, for excommunication (e). This power of citation to take or refuse probate was, it is apprehended, transferred to the Court of Probate by the 23rd section of the Court of Probate Act, 1857, and now to the Probate Division of the High Court of Justice, and a neglect to appear to the citation may be punished as for a contempt of the Court under the 25th section.

but might be convened by the Ordinary to accept or refuse.

(a) Bac. Abr. Exors. (E.) 9. See Douglas v. Forrest, 4 Bingh. 704, in the judgment of Best, C.J.

(b) Doyle v. Blake, 2 Scho. & Lef. 239.

(c) See stat. 1 Edw. VI. c. 2, as to the form of the citation.

(d) Wentw. Off. Ex. 88, 14th edit. Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 4.

(e) See stat. 2 & 3 W. IV. c. 93. (Act for enforcing process upon contempts in the Courts Ecclesiastical.)

The time allowed to the person named executor, to deliberate whether he will accept or refuse the executorship, is uncertain, and left to the discretion of the judge, who has used, at his pleasure, not only within the year, but within a month or two, to issue his citation (*f*).

Letters *ad colligendum*.

If he appear, either on citation or voluntarily, and pray time to consider whether he will act or not, the Ordinary might, though the practice seems now obsolete, grant letters *ad colligendum* in the interim (*g*). But if he appear, and refuse to act or fail to appear to the above-mentioned process, administration *cum testamento annexo* will be granted to another (*h*).

administration *cum testamento annexo*.

Stat. 21 & 22 Vict. c. 95, s. 16:

executor not acting or not appearing to a citation to be treated as if he had renounced.

And by stat. 21 & 22 Vict. c. 95, s. 16, "whenever an executor appointed in a Will survives the testator but dies without having taken probate, and whenever an executor named in a Will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor" (*i*).

In what cases

Although, as above stated, an executor has his election

(*f*) Swinb. Pt. 6, s. 4. Godolph. Pt. 2, c. 19, s. 1.

(*g*) *Broker v. Charter*, Cro. Eliz. 92. Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 4. Toller, 41.

(*h*) Swinb. Pt. 6, s. 1, pl. 3, s. 2, pl. 3, 4. See as to administration *cum testamento annexo*, generally, *post*, Pt. I. Bk. v. Ch. III. § 1.

(*i*) This enactment seems, in effect, to extend the 79th section of the stat. 20 & 21 Vict. c. 77 (*post*, p. 233), to the case of a party cited, who will not renounce or take any step. Therefore, where an executor to whom power has been reserved survives his acting co-executor, and does not appear to a

citation, the case will stand as if his name had never appeared in the Will, and the executor, if any, of the acting executor will be the representative of the original testator: In the goods of Noddings, 2 Sw. & Tr. 15. So on the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased: In the goods of Lorimer, 2 Sw. & Tr. 471. The section applies where the executor is cited to take probate of a copy of a Will, and does not appear: *Davis v. Davis*, 31 L. J., P. M. & A. 216.

whether he may determine administration that he has Court may an executor part of the p will within s two months specting the ended within is liable to a which penalty recoverable recovery of p

If an execution of the administration has been decided rogative Court and refuse the

Although it should s (though per notwithstanding has acted, an tion to another the executor

(*j*) Godolph. Swinb. Pt. 6, s. Bro. Exors. pl. 3 Hagg. 774.

(*k*) 55 Geo. amended by the Land Revenue c. 12, § 40.

(*l*) Brookes

whether he will accept or refuse the executorship, yet he may determine such election, by acts which amount to an administration. For if he once administer, it is considered that he has already accepted of the executorship, and the Court may compel him to prove the Will (*j*). And if an executor take possession of, and in any way administer, any part of the personal estate, without obtaining probate of the will within six months of the death of the testator, or within two months after the termination of any suit or dispute respecting the will, if there be any such, which shall not be ended within four months after the death of the testator, he is liable to a penalty of *double the amount of duty chargeable*, which penalty becomes a debt due from him to the Crown, recoverable by any of the ways or means in force for the recovery of probate, legacy or succession duties (*k*).

If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter: And it has now been decided in accordance with the practice of the Prerogative Court that he cannot take upon himself the latter and refuse the former (*l*).

Although there are old cases to the contrary, the law, it should seem, is now taken to be, that the Court *may* (though perhaps it ought not) accept the executor's refusal, notwithstanding he has administered (*m*). So if the executor has acted, and the Court, not knowing it, commits administration to another, though the administration may be revoked, and the executor compelled to prove the Will (*n*), yet the grant

an executor
may refuse :

he cannot if he
once adminis-
ter.

Executor liable
to penalty of
double duty if
he does not
obtain probate
within six
months of tes-
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or within two
months of ter-
mination of
probate suit.

Nor can the
executor of an
executor refuse
if he once
administer.

^ Court may
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fusal, not-
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(*j*) Godolph. Pt. 2, c. 19, s. 2. Swinb. Pt. 6, s. 2, pl. 6, s. 22, pl. 1. Bro. Exors. pl. 90. Long v. Symes, 3 Hagg. 774. Mordaunt v. Clarke, L. R. 1 P. & D. 592.

(*k*) 55 Geo. III. c. 184, § 37, amended by the Customs and Inland Revenue Act, 1881. 44 Vict. c. 12, § 40.

(*l*) Brooke v. Haymes, L. R. 6

Eq. 25. In the goods of Perry, 2 Curt. 655.

(*m*) 1 Roll. Abr. Exor. (C.) 2, p. 907. Wentw. Off. Ex. 91, 14th edit. 2 Scho. & Lefr. 237. *Factum valet*, says Wentworth, *quod fieri non debuit*. See also Jackson v. Whitehead, 3 Phillim. 577.

(*n*) Wentw. Off. Ex. 91, 14th edit. Godolph. Pt. 2, c. 31, s. 3.

of administration *cum testamento annexo*, until so revoked, is valid; and, consequently, in neither of these cases can a debtor to the testator, in answer to a suit by such administrator, set up the act in *pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator (o).

If one of several executors, after intermeddling with the effects, renounces, his renunciation is invalid, and the record of it on the probate granted to his co-executors ought to be cancelled (p).

The only sense in which the committing of the administration under such circumstances can now be said to be void, is, as far as respects the protection of the executor: for if he has once administered, he will remain liable to be sued as executor, both at law and in equity, in spite of his renunciation, and the consequent appointment of an administrator (q). So if an executor administer to part of the assets, he shall be charged with the receipts, as executor, though he renounced the executorship, and paid the money to the other executor who proved the Will (r).

The general question as to the liability, to creditors and legatees, of an executor who renounces after an act of administration, or who proves the Will, and then professes to renounce his representative character, will be considered at large in a subsequent part of this Treatise (s).

With respect to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: 1st, That whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will regularly amount to an administration. 2ndly, That whatever acts will make a man liable as an

(o) *Doyle v. Blake*, 2 Scho. & Lefr. 237.

(p) In the goods of *Badenach*, 3 Sw. & Tr. 465, in which case one of several co-executors who had renounced after intermeddling was allowed, notwithstanding section 79 of 20 & 21 Vict. c. 77, to retract

his renunciation on the ground that the renunciation was invalid after intermeddling.

(q) *Wentw. Off. Ex.* 92, 14th edit.

(r) *Read v. Truelove*, Amb. 417.

(s) *Post*, Pt. IV. Bk. II. Ch. II. § II.

Renunciation of one of several executors after intermeddling invalid.

The executor is liable to be sued, although administration be granted to another, if he has administered.

Question of liability to creditors and legatees of executor renouncing after acts of administration.

What amounts to an administration.

Ch. VI. § I.]

executor *de* executorship

Hence, it is possession of own use, or distribution (x). So an apprehension administers the where the test executor seizes testator, with intention app

Where a man in answer to letter, saying, held to afford executor (a).

But if an executor property in the he had no right claim of property than that of ad

If an executor especially if he to an election due to the test

(t) See *ante*, Ch. VI. as to what acts man executor *de* a

(u) *Godolph.* and s. 6. *Bac. A* (E) 10. *Toller*, *Green*, 2 *Curt.* *Wentw. Off. Ex.* edit.

(v) *Wentw. c.* edit.: or even ta hands, some say, ing them: *Ibid.*

executor *de son tort* (t), will be deemed an election of the executorship (u).

Hence, it has been adjudged, that if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, this is an administration (x). So if he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration (y). As where the testator being tenant at will of certain goods, his executor seized the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law (z).

Where a man who was named as one of several executors, in answer to an inquiry who were the executors, wrote a letter, saying, that he and others were executors, this was held to afford sufficient evidence that he had acted as executor (a).

But if an executor seizes the testator's goods, claiming a property in them himself, though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him than that of administering as executor (b).

If an executor receives debts due to the testator, and, especially if he gives acquittances for such debts, this amounts to an election of the executorship; so, if he releases a debt due to the testator (c).

(t) See *ante*, Ch. v. p. 208, *et seq.*, as to what acts will constitute a man executor *de son tort*.

(u) Godolph. Pt. 2, c. 8, s. 1, and s. 6. Bac. Abr. tit. Executors (E.) 10. Toller, 43. Rayner v. Green, 2 Curt. 248; but see Wentw. Off. Ex. c. 3, p. 94, 14th edit.

(z) Wentw. c. 3, p. 93, 14th edit.: or even take them into his hands, some say, without converting them: *Ibid*.

(y) 1 Roll. Abr. 917, pl. 12. Bac. Abr. tit. Executors (E.) 10.

(z) 1 Roll. Abr. 917, pl. 13. Bac. Abr. tit. Executors (E.) 10.

(a) Vickers v. Bell, 10 Jur. N. S. 376. 3 N. R. 624.

(b) Bac. Abr. tit. Executors (E.) 10.

(c) Wentw. Off. Ex. 94, 14th edit. Swinb. Pt. 6, s. 22, pl. 2. 1 Roll. Abr. 917, pl. 7, 8. Pytt v. Fendall, 1 Cas. temp. Lee, 553.

So, if there are two executors, and one of them hath a specific legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a devisee cannot take a personal chattel devised to him, without the assent of the executor (*d.*)

In the case of *Long v. Symes* (*e*) the insertion of an advertisement calling on persons to send in their accounts, and to pay money due to the testator's estate, to A. and B. "his executors in trust," was held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance: the estate being small, and left for two years and a half without a representative.

An executor who has not proved is not to be considered as acting by assisting a co-executor, who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator, and requiring payment (*f*). But in *Harrison v. Graham* (*g*), Barbara Graham by Will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the Will, and acted chiefly as executor, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. Stock, received the money, and paid it over the same day to Margaret: After this she and the mother died, making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: But Lord Hardwicke held that this was such an act of administra-

(*d*) 1 Roll. Abr. 917, tit. Exor.
(*B.*) pl. 9. Bac. Abr. tit. Exor.
(*E.*) 10. See *infra*, Pt. III. Bk. III.
Ch. iv. § III.

(*e*) 3 Hagg. 771.

(*f*) *Orr v. Newton*, 2 Cox. 274.
See also *Stacey v. Elph*, 1 M. & K.
195.

(*g*) 3 Hill's MSS. 239. 1 P
Wms. 241, note (*y*) to 6th edit.

tion in Robert
own estate (*h*)

Taking the
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(*h*) The judge
will be found
Pt. IV. Bk. II. C.

(*i*) *Macdonell*
Hagg. 216.
nounce after
bate: In the

tion in Robert, as should make him chargeable as to his own estate (*h*).

Taking the oath as executor is not to be considered as an intermeddling such as to preclude renunciation (*i*). In a case indeed, decided 31 Car. II., the executor named in the Will had taken the usual oath, and then refused (but after a *caveat* entered); and another endeavoured to obtain letters of administration: the executor came afterwards to desire the Will under probate, and contested the granting of administration: and it was adjudged against him, supposing that he was bound by the refusal: But after an appeal to the Delegates, a *mandamus* was prayed, and granted by the Court of King's Bench: for that, having taken the oath, he could not be admitted to refuse, and the Ecclesiastical Court had no further authority (*k*). However, if he has not administered, the Court will now, upon his own application, dismiss him, and allow him to renounce probate, even after the usual oath, and an appearance given as executor. Such a renunciation was permitted in the case of *Jackson v. Whitehead* (*l*), in order that the executor might be examined as a witness; and Sir John Nicholl, in giving his judgment, seemed to doubt the correctness of the report of the former case, and said, that at most it only decided that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship.

With respect to the mode of refusal by the executor, it is laid down that refusal cannot be verbally, or by word, but it must be by some act entered or recorded in the Spiritual Court; and therefore must be done before some judge spiritual, and not before neighbours in the country (*m*). But if the executor send a letter to the Ordinary, by which he

An executor may renounce after he is sworn.

How an executor may renounce:

the refusal must not be in *pais*, but in the Spiritual Court:

(*h*) The judgment in this case will be found fully stated, *post*, Pt. IV. Bk. II. Ch. II. § II.

(*i*) *Macdonell v. Prendergast*, 3 Hagg. 216. But he cannot renounce after he has taken probate: In the goods of *Veiga*, 32

L. J., P. M. & A. 9.

(*k*) *Anon.* 1 Ventr. 335.

(*l*) 3 Phillim. 577. See also *Long v. Symes*, 3 Hagg. 774.

(*m*) *Wentw. Off. Ex.* 88, 14th edit. *Long v. Symes*, 3 Hagg. 776.

renounces, and the refusal be recorded, it is sufficient. As in a case where Sir Ralph Rowlet made the Lord Keeper Bacon, C. J. Catlin, and the Master of the Rolls, executors; they wrote a letter to the Ordinary, that they could not attend the executorship, and therefore wished him to commit administration; who did so, making every one of their refusals to be recorded; and this was held good (*n*). And accordingly it has been held that the renunciation need not be under seal (*o*).

until refusal
recorded no
one can take
administration:
before whom,
when the Or-
dinary himself
is executor :

Until the refusal is recorded, no person can take administration (*p*).

In case the Ordinary himself were made executor, then he might refuse before his own commissary (*q*).

form of renun-
ciation :

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with (*r*).

executor de-
clining the
usual oath :

If the executor refuse to take the usual oath, or being a Quaker to make the affirmation, this amounts to a refusal of the office, and shall be so recorded (*s*).

his renuncia-
tion cannot be
in part :

An executor cannot in part refuse. He must refuse

(*n*) *Broket v. Charter*, Cro. Eliz. 92. S. C. *Owen*, 44. Moor, 272. 1 Leon. 135. Wentw. Off. Ex. 88, 14th edit. Godolph. Pt. 2, c. 19, s. 4.

(*o*) In the goods of *Boyle*, 3 Sw. & Tr. 426.

(*p*) *Long v. Symes*, 3 Hagg. 776. And until the refusal has been recorded, it can be withdrawn. In the goods of *Morant*, L. R. 3 P. & D. 151. Administration will not be granted on the consent of the executor. The executor must either renounce probate or fail to appear to citation under stat. 21 & 22 Vict. c. 95, sect. 16, *ante*, p. 226. *Garrard v. Garrard*, L. R. 2 P. &

D. 238.

(*q*) Wentw. Off. Ex. 89. Bro. Ordinary, pl. 13. The usual practice of the Registry has been to require renunciation to be under the hand of the party entitled to the grant. But where he is out of England, an authority to renounce by power of attorney may suffice: In the goods of *Rosser*, 3 Sw. & Tr. 490.

(*r*) *Toller*, 42.

(*s*) *Rex v. Raines*, 1 Lord Raym. 363, *per Holt*, C.J. *Toller*, 41. As to the effect of an executor not appearing when cited to take probate, see *ante*, p. 226.

entirely, or not exist in the person; for the be executor t But it has nov lished practice do so (*u*).

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(*t*) *Paule v. M* 132. 11 Vin. A

(*u*) *Brooke v* Eq. 25. In the Curt. 653. *Ant*

(*v*) In the g

entirely, or not at all (t). An exception has been supposed to exist in the case of his testator being executor to another person; for there, it has been said, he might well assent to be executor to the one testator, and refuse for the other. But it has now been decided in accordance with the established practice of the Prerogative Court that he can not do so (u).

It was the practice of the prerogative office of Canterbury not to receive the renunciation of a party, unless it be accompanied by the original Will of the deceased, probate of which it purports to renounce (v).

the renunciation will not be received unless accompanied by the Will.

SECTION II.

The consequence of Renunciation by an Executor.

Prior to the passing of stat. 20 & 21 Vict. c. 77, s. 79, it had been established, by the practice of the Prerogative Court and the decided cases, that the renunciation of an executor might be retracted at any time before administration granted, and that where there was a sole executor who renounced or several who all renounced and administration was granted, the renunciation could never be retracted; but that where there were several executors and some renounced and others proved the Will the renunciation was not peremptory, but might be retracted at any time before any actual grant of administration *de bonis non*, but not afterwards (x).

Former practice as to retraction by executor of renunciation.

But now by stat. 20 & 21 Vict. c. 77, s. 79, "where any person, after the commencement of this Act, renounces probate of the Will of which he is appointed executor, or one of the executors, the rights of such person in respect of the

Modern practice under stat. 20 & 21 Vict. c. 77, s. 79. Rights of an executor re-

(t) *Paule v. Moodie*, 2 Roll. Rep. 132. 11 Vin. Abr. 139, pl. 10.

(u) *Brooke v. Haymes*, L. R. 6 Eq. 25. In the goods of Perry, 2 Curt. 655. *Ante*, p. 227, note (l).

(v) In the goods of Fenton, 3

Add. 35.

(x) See as to the practice and authorities prior to 20 & 21 Vict. c. 77, s. 79, the former editions of this Work: Pt. I. Bk. III. Ch. VI. § II.

nouncing probate to cease as if he had not been named in the Will.

Rule 50, P. R. No person renouncing in one character to take representation in another.

Whether executors may, after renouncing, exercise a power.

executorship shall wholly cease, and the representation of the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor" (y).

"By rule 50, P. R. (non-contentious business), no person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character" (z).

It is said by very eminent writers, that where a power is given to executors, they may exercise it, although they renounce probate of the Will (a). But with the greatest deference to their authority, it may be doubted whether the position is true, unless when the power is given them in their proper names, and without reference to their office as executors (b).

(y) See In the goods of Noddings and In the goods of Lorimer, *ante*, p. 226, note (i). There is nothing in this enactment to prevent the Court from allowing a retraction of the renunciation according to the old practice in a case fit for it, *e.g.*, where it has taken place after an intermeddling: In the goods of Badenach, 3 Sw. & Tr. 465. But such retraction will not be allowed unless it can be shown that it will be for the benefit of the estate or of those interested under the Will: In the goods of Gill, L. R. 3 P. & D. 113. In the goods of Loftus, 3 Sw. & Tr. 307. This section does not apply to an executor who renounced before the Act came into force: In the goods of Whitham, L. R. 1 P. & D. 303.

(z) See In the goods of Loftus, 3 Sw. & Tr. 307, from which it appears that this rule is capable of

modification by the Court. See also In the goods of Wheelwright, 3 P. D. 71. In the case of In the goods of Russell, L. R. 1 P. & D. 634, the Court allowed one who had been appointed executor and renounced that office, to take administration *test. amaro* as attorney of the other executors notwithstanding rule 50. A renunciation may be retracted at any time before it is filed and recorded in the registry: In the goods of Morant, L. R. 3 P. & D. 151. As to renunciation by a next of kin, see *post*, Pt. I. Bk. v. Ch. III. § 1.

(a) 1 Sugden on Powers, 138, 6th edit. 2 Prest. on Abstr. 264.

(b) See Perkins, No. 548, where the distinction is thus taken: "If a man will that A. and B., his executors, shall sell, &c., and they refuse before the Ordinary, yet it seems they may sell, because they are certainly named, so that it ap-

If a power executors, appointed several others who are

If a debtor and the creditor he may bring

appears the Will that they shall refuse or not. shall be (as it that his executor out expressing they all refuse they cannot cases of Yates Wms. 309, and 14 Ves. 434 (v. E. Sugden).

power was given trustees and executors the executors renounced, with Sir W. Grant power is given but they have they have renounced in which

If a power has been conferred on a party to a deed, his executors, administrators, and assigns, and he dies, having appointed several executors, one of whom renounces, the others who act may well exercise the power (c).

If a debtor makes his creditor and another his executors, and the creditor neither intermeddles, nor proves the Will, he may bring an action against the other executor (d).

An executor who renounces may sue his co-executor.

pears the Will of the testator is, that they shall sell, whether they refuse or not. But otherwise it shall be (as it seems) if he will that his executors shall sell, without expressing their names, and they all refuse before the Ordinary, they cannot sell." See also the cases of *Yates v. Compton*, 2 P. Wms. 309, and *Keates v. Burton*, 14 Ves. 434 (which is cited by Sir E. Sugden). In the latter case, a power was given to "my said trustees and executors," and one of the executors died and the other renounced, without exercising it: Sir W. Grant observed, "The power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent

to them to exercise it." The view taken by the Author in the text has been confirmed by the decision of the Court of Appeal in *Crawford v. Forshaw* [1891], 2 Ch. 261: in which case it was held (reversing the decision of Kekewich, J.) that an executor, who had renounced probate, could not act in the exercise of a power of selecting charities and distributing a residue amongst them: and that the power was given to the executor in the character of executor, and that the two who had proved could exercise it alone.

(c) *Granville (Earl) v. McNeile*, 7 Hare, 156.

(d) *Dorchester v. Webb*, Sir W. Jones, 345. *Rawlinson v. Shaw*, 3 Term Rep. 557.

BOOK THE FOURTH.

OF PROBATE.

CHAPTER THE FIRST.

OF THE NECESSITY OF OBTAINING PROBATE IN THE PROBATE DIVISION OF THE HIGH COURT OF JUSTICE, AND OF THE JURISDICTION AND AUTHORITY OF THAT COURT: AND THEREWITH OF THE ACTS AND LIABILITIES OF AN EXECUTOR BEFORE PROBATE.

SECTION I.

The Will must be proved in the Probate Division.

The Ecclesiastical Court was formerly the only Court in which the validity of a Will of personalty could be established or disputed.

IT appears to have been a subject of much controversy, whether the probate of Wills was originally a matter of exclusive ecclesiastical jurisdiction (a). But whatever may have been the case in earlier times, it is certain that, at the time of the passing of the Court of Probate Act (stat. 20 & 21 Vict. c. 77), the Ecclesiastical Court was the only Court in which the validity of Wills of personalty, or of any testamentary paper whatever relating to personalty, could be established or disputed (b). An exception to this general rule was to be found in the case of certain Courts Baron that had had probate of Wills time out of mind, and had always continued that usage.

(a) Bac. Abr. Exors. (E.) 1. Dyke v. Walford, 5 Moo. P. C. 434.

(b) Fonblanq. Treat. on Eq. Pt. 2, c. 1, s. 1, note (a). Bac. Abr. Exors. (E.) 1. Post, Pt. I. Bk. v.

Ch. I. Gascoyne v. Chandler, 2 Cas. temp. Lee, 241. See post, Pt. I. Bk. iv. Ch. II. § IX., as to the general question, of what instruments probate is necessary.

Ch. I. § I.]

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(d) 4 Inst. 3.

Regularly the Court in which the testament of a deceased person ought to have been proved was the Court of the Ordinary of the place wherein the testator dwelt, *i.e.*, generally speaking the bishop of the diocese.

In which of the Ecclesiastical Courts the Will was to be proved.

But if the deceased, at the time of his death, had effects to such an amount as to be considered notable goods, usually called *bona notabilia*, within some other diocese or peculiar (*c*) than that in which he died, then the Will must have been proved before the Metropolitan of the province by way of special prerogative (*d*); whence the Courts where the validity of such Wills was tried, and the offices where they were registered, were called the Prerogative Courts and the Prerogative Offices of Canterbury and York (*e*).

But by stat. 20 & 21 Vict. c. 77 (intituled *An Act to amend the Law relating to Probates and Letters of Administration in England*), after reciting that "it is expedient that all jurisdiction in relation to the grant and revocation of probates of Wills and letters of administration in England should be exercised in the name of her Majesty in one court," it is enacted by sect. 3, that "the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England, now having jurisdiction or authority to grant or revoke probate of Wills or letters of administration of the effects of deceased persons, shall, in respect of such matters, absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such court or person."

20 & 21 Vict. c. 77, s. 3. Testamentary and other jurisdictions of Ecclesiastical and other Courts abolished.

And by sect. 4, "The voluntary and contentious jurisdiction

S. 4. Testamentary

(*c*) "Peculiars" were certain districts exempt from the jurisdiction of the Ordinary of the Diocese in which they lay, and were so called because they had a *peculiar* and special Ordinary of their own.

(*e*) With regard to the jurisdiction and authority exercised prior to the passing of the Court of Probate Act by the Ecclesiastical Courts, see the former editions of this Work: Pt. I. Bk. IV. Ch. I.

(*d*) 4 Inst. 335.

§ 1.

jurisdiction to be exercised in the Queen's name by a Court of Probate.

S. 23. The Court to have throughout all England the same powers as the Prerogative Court within the province of Canterbury.

tion and authority in relation to the granting or revoking probate of Wills and letters of administration of the effects of deceased (*f*) persons now vested in or which can be exercised by any court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary (*g*), shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned, be exercised in the name of her Majesty in a court to be called the Court of Probate, and to hold its ordinary sittings, and to have its principal registry at such place or places in London and Middlesex as her Majesty in council shall from time to time appoint."

And by sect. 23, "The Court of Probate shall be a Court of Record, and such Court shall have the same powers, and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary, and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which by statute or otherwise are imposed on or should be performed by Ordinaries generally, or on or by the said Prerogative Court, in respect of probates, administrations or matters or causes testamentary within their respective jurisdictions, shall be performed by the Court of Probate; provided that no suits for legacies, or suits for the distribution of residue, shall be entertained by

(*f*) By the interpretation clause, sect. 2, "'Will' shall comprehend 'Testament,' and all other testamentary instruments of which probate may now be granted, and 'Administration' shall comprehend all letters of administration of the effects of deceased persons, whether with or without the Will

annexed, and whether granted for general, special, or limited purposes."

(*g*) By the interpretation clause, sect. 2, "'Matters and causes testamentary' shall comprehend all matters and causes relating to the grant and revocation of probate of Wills or of administration."

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the Court or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished."

Hence it appears that the exclusive jurisdiction in the probate of Wills and granting of administration, which formerly belonged to the Ecclesiastical Courts, was completely and universally throughout England transferred to the newly created Court of Probate (*h*).

Court of Probate substituted for the Ecclesiastical Courts universally.

Now by the Supreme Court of Judicature Act, 1873 [which commenced on Nov. 1, 1875], the existing Courts therein named (of which the Court of Probate was one) were united and consolidated together as one Supreme Court of Judicature in England (sect. 8).

36 & 37 Vict. c. 66.

Court of Probate to form a Division of High Court of Justice.

This Supreme Court consists of two Divisions :—

(1.) "Her Majesty's High Court of Justice," exercising original jurisdiction.

(2.) "Her Majesty's Court of Appeal," exercising appellate jurisdiction (sect. 4).

The "High Court of Justice" is a Superior Court of Record, and to it is transferred and in it is vested, amongst other jurisdictions, that which was vested or capable of being exercised by the Court of Probate at the commencement of the Act. The jurisdiction so transferred to the High Court includes the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by the judge of the Court of Probate sitting in Court, or Chambers, or elsewhere, when acting as a judge in pursuance of any statute, law, or custom, and all powers given to the Court of Probate

Jurisdiction of Court of Probate transferred to High Court of Justice.

(*h*) By sect. 23, all suits pending at the time of the Act, in any Court in England, respecting any grant of probate or administration shall be transferred to the Court of Probate (but this enactment is not to apply to the Privy Council). And by stat. 21 & 22 Vict. c. 95, s. 14, in the same way all non-contentious business also shall be deemed to have been transferred

to the Court of Probate, and all oaths and bonds sworn and executed as required by any Ecclesiastical Court in reference to such business, prior to Jan. 11, 1868 (the day when the Court of Probate Act, 1857, came into operation) shall be as effectual as if sworn or executed in pursuance of the Court of Probate Act or this Act.

or to the judge of that Court by any statute, and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdiction so transferred (sect. 16).

The jurisdiction of the Court of Probate which by the Act was transferred to and vested in the High Court from and after the commencement of the Act, ceased to be exercised except by the "High Court of Justice" as provided by the Act (sect. 22).

Jurisdiction of Probate Division : how exercised in Procedure and Practice.

The jurisdiction of the Court of Probate transferred to the "High Court of Justice" is exercised (so far as regards procedure and practice) in the manner provided by the Act or by such Rules and Orders of Court as may be made from time to time pursuant to the Act, and where no special provision is contained in the Act or in any such Rules or Orders of Court with reference thereto, the jurisdiction is exercised as nearly as may be in the same manner as the same might have been exercised in the Court of Probate previously to the commencement of the Act (sect. 23).

The "High Court of Justice" consists of three Divisions, of which one is the "Probate, Divorce, and Admiralty Division" (sect. 31; Order in Council, 16 December, 1880).

Exclusive jurisdiction of Probate Division.

To the "Probate, Divorce, and Admiralty Division" are assigned all causes and matters which would have been within the exclusive cognisance of the Court of Probate if the Act had not passed (sect. 34).

Although all matters which prior to the passing of the Judicature Act would have been within the exclusive cognisance of the Court of Probate are assigned by that Act to the Probate Division of the High Court, still, inasmuch as all judges of the High Court by the powers given to them by that Act have the same jurisdiction, it seems to follow that any judge, whether of the Queen's Bench or Chancery Division, may in his discretion exercise jurisdiction in any matter which is assignable to the Probate Division. But, although, according to this principle a judge in the Chancery Division has jurisdiction to grant probate of a Will, it would appear for many reasons to be so inconvenient that any judge

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except a judge in the Probate Division should grant probate, that the judge in the Chancery Division, if requested to exercise such jurisdiction, would use a sound discretion in refusing to do so, and in directing the parties to obtain probate in the Division to which such matters have been assigned. This view that the Chancery Division has jurisdiction, if it thinks fit to exercise it, was adopted by Sir George Jessel, M.R., in the case of *Pinney v. Hunt* (i), and followed by Pearson, J., in *Bradford v. Young* (k). On the other hand, in the case of *Priestman v. Thomas* (l), Sir James Hannen in his judgment is reported to have said: "It is further contended that the plaintiff, if entitled to have the probate of the Will revoked, ought to have claimed it in the action in the Chancery Division. But I am of opinion that he could not properly have done so, as the granting or revoking of probates was within the exclusive cognizance of the Court of Probate, and is therefore now assigned to this Division." And this view seems to have met with the approval of Cotton, L.J., who in his judgment in the same case when before the Court of Appeal (m) said, that "The object sought by that action (to wit, a revocation of probate) was not within the jurisdiction of the Chancery Division."

It is to be observed that section 11 of the Judicature Act, 1875, which gives a person, commencing any action or matter in the High Court, liberty, (subject to the Rules of Court and the provisions in the Judicature Acts, and to the power of transfer) to assign the action to one of the Divisions of the High Court "as he may think fit," goes on to provide that if he assign the action to a Division to which, according to the Rules of Court or the provisions of the Acts, it ought not to be assigned to, a judge of such Division, even though application is made to him to direct a transfer of the action or matter to the Division to which it ought to have been assigned, may retain the

(i) 9 C. D. 98.

(l) 9 P. D. 70, 210.

(k) 26 C. D. 656.

(m) 9 P. D. 210, 214.

same, if he think it expedient so to do, in the Division in which it was commenced. The section further provides that (subject to the Rules of Court) a person commencing any cause or matter shall not assign the same to the Probate, Divorce and Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if the Judicature Act had not been passed. It will be noticed that the section is silent as to the converse proposition, viz., the commencing, in a Division other than the Probate Division, of an action or matter which, before the Judicature Acts, would have been commenced in the Court of Probate, and in that Court alone; and it may reasonably be inferred that the Act advisedly left open such a course of procedure, while specifically forbidding a person to commence an action or cause in the Probate Division, of such a nature as would not have come within the exclusive jurisdiction of the Court of Probate in former days.

The executor cannot rely on his title in any Court without the production of the probate.

The Probate.

The practical consequence is, that an executor cannot assert or rely on his right in any Court without showing that he has previously established it in the Probate Division: the usual proof of which is, the production of a copy of the Will by which he is appointed, certified under the seal of the Court. This is usually called the probate, or the letters testamentary. In other words, nothing but the probate, (or letters of administration with the Will annexed, when no executor is therein appointed, or the appointment of executor fails,) or other proof tantamount thereto of the admission of the Will in the Probate Division is legal evidence of the Will in any question respecting personalty (n). The Will of a deceased Sovereign of the realm is no exception to this rule,

(n) If a Will be made in a foreign country, and proved there, disposing of goods in England, the executor cannot have action on such probate, but ought to prove

the Will here: *Lee v. Moore*, Palm. 165. *Tourton v. Flower*, 3 P. Wms. 370. See *post*, Pt. I. Bk. IV. Ch. II. § VI.

Ch. I. § I.]

notwithstanding of such a Will.

The probated evidence of the executor's title to himself, and at the moment of the production, is death (r).

It should be considered an executor's duty to their legacies, kin of the testator, peculiar objects, will compel trusts with well as in Court is conclusive equitable judgment order to enable executor. called Court of Probate.

It should be noted that Courts had also Courts because suits. Indeed, the exclusively Chancery, equitable judgment.

(a) *Ante*, p. 480.
(p) *Ryves v. Ton*, 9 Beav.
(q) *Smith v. Smith*, 480.
(r) *Went*.

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notwithstanding (as it has already appeared (o)) no probate of such a Will can be granted by the Court (p).

The probate is, however, merely operative as the authenticated evidence, and not at all as the foundation, of the executor's title: for he derives all his interest from the Will itself, and the property of the deceased vests in him from the moment of the testator's death (q). Hence the probate, when produced, is said to have relation to the time of the testator's death (r).

It should further be observed that a Court of Equity considers an executor as trustee for the legatees in respect to their legacies, and, in certain cases, as trustee for the next of kin of the undisposed-of surplus: and as all trusts are the peculiar objects of equitable cognizance, Courts of Equity will compel the executor to perform these his testamentary trusts with propriety. Hence, although in those Courts, as well as in Courts of Law, the seal of the Court of Probate is conclusive evidence of the *factum* of a Will (s), an equitable jurisdiction has arisen of *construing* the Will, in order to enforce a proper performance of the trusts of the executor. The Courts of Equity are consequently sometimes called Courts of Construction, in contradistinction to the Court of Probate.

It should be observed, that as long as the Ecclesiastical Courts had the exclusive testamentary jurisdiction, they were also Courts of Construction as well as Courts of Probate, because suits for legacies might have been brought therein. Indeed, the cognizance of legacies in former times belonged exclusively to the ecclesiastical jurisdiction; for the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (t).

An executor derives his title from the Will and not the probate :

relation of the probate to the testator's death.

Courts of Equity are Courts of construction of Wills :

and so were the Ecclesiastical Courts :

(o) *Ante*, p. 11.

(p) *Ryves v. Duke of Wellington*, 9 Beav. 579.

(q) *Smith v. Milles*, 1 T. R. 475, 480.

(r) *Went. Off. Ex.* 115, 14th

edition. *Whitehead v. Taylor*, 10 A. & E. 210. *Ingle v. Richards*, 28 Beav. 366.

(s) See *post*, Pt. I. Bk. VI. Ch. I.

(t) *Deeks v. Strutt*, 5 T. R. 690,

692.

but the Court
of Probate was
not :

nor is the Pro-
bate Division
of the High
Court of
Justice.

38 & 39 Vict.
c. 77, s. 11
(sub-s. 3).

21 & 22 Vict.
c. 77, s. 24.
Power of Court
of Probate to
examine wit-
nesses.

As to produc-
tion of deeds,
&c.

But the Court of Probate was not a Court of Construction; for, as it has already appeared (*u*), the 23rd section of the Act by which it was created expressly prohibited it from entertaining any such suit. The same observations would seem to apply to the Probate Division of the High Court of Justice, for by sect. 84 of the Judicature Act, 1873, all causes and matters which would have been within the exclusive cognizance of the Court of Probate are assigned to the Probate Division of the High Court, and by the same section all causes and matters "for the administration of the estates of deceased persons," and for "the execution of trusts charitable or private" are assigned to the Chancery Division of the High Court.

And by sect. 11 (sub-s. 3) of the Judicature Act of 1875, it was enacted that, subject to rules of Court, a person commencing any cause or matter shall not assign the same to the Probate Division, unless he would have been entitled to commence the same in the Court of Probate.

By section 24 of the Court of Probate Act, "The Court of Probate may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be examined in any suit or other proceeding in respect of matters, or causes testamentary (*x*), and may examine, or cause to be examined, upon oath or affirmation, as the case may require, parties and witnesses by word of mouth; and may either before or after, or with or without such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the Court may by writs require such attendance, and order to be produced before itself

(*u*) *Ante*, pp. 238, 239.

(*x*) Where an executor was desirous to propound in solemn form the last Will of his testator, and cited certain next-of-kin, but was unable to ascertain what other persons were entitled in the distribution, the Court, under this section,

ordered a subpoena to issue for the attendance of certain persons, to be examined as to their knowledge of the members of the family and the other next-of-kin of the deceased. *Shepherd v. Beetham*, L. R. 2 P. & D. 384. In the goods of Sweet, [1891] P. 400.

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Probate Act,

or otherwise any deeds, evidences, or writings, in the same form, or nearly as may be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, is now issued by any of her Majesty's Superior Courts of Law at *Westminster*; and every person disobeying any such writ shall be considered as in contempt of Court, and also be liable to forfeit a sum not exceeding one hundred pounds."

By section 25, "The Court of Probate shall have the like powers, jurisdiction and authority, for enforcing the attendance of persons required by it as aforesaid; and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments, made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the Orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court."

Sect. 25.
Power of the
Court to en-
force orders.

By stat. 21 & 22 Vict. c. 95, s. 17, "The Judge of the Court of Probate shall have and exercise the same power of altering and amending grants of probate and letters of administration, made before January 11, 1858 (y), as any Ecclesiastical Court had and exercised in respect of such grants."

21 & 22 Vict.
c. 95, s. 17.
Judge of the
Court of Pro-
bate may
amend grants
made before
Jan. 11, 1858.

In order to meet the case of grants made before the Act, which were void or voidable by reason of the Courts not having jurisdiction (z), and also of grants which, though not void or voidable, were not sufficiently extensive by reason of not reaching property situate out of the jurisdiction of the Court that made the grant, provision is made by sections 86, 87 and 88 of the Probate Act, 1857 (20 & 21 Vict. c. 77).

Cases of grants
void or void-
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bilis made
before the
Probate Act.

By stat. 21 & 22 Vict. c. 95, s. 20, "All second and

21 & 22 Vict.
c. 95, s. 20.
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(y) The Day when the Court of Probate Act, 1857, came into operation.

(z) See *ante*, p. 237.

subsequent grants to be made where the original Will or the original letters of administration are deposited.

subsequent grants of probate or letters of administration shall be made in the Principal Registry, or in the District Registry where the original Will is registered or the original grant of letters of administration has been made, or in the District Registry to which the original Will or a registered copy thereof, or the record of the original grant of administration, have been transmitted by virtue of a requisition issued in pursuance of section eighty-nine of 'The Court of Probate Act,' and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry, it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made."

Jurisdiction of County Courts in contentious business.

County Courts have jurisdiction in all *contentious* business, *i.e.*, grants or revocation of grants of probate or letters of administration, provided (1) the deceased had at the time of his death his fixed place of abode in the district of the County Court to which application is made; and (2) the personal estate of the deceased (exclusive of property possessed by him as trustee and debts due from him) was at his death under the value of 200*l.*, and his real estate to which he was beneficially entitled was under 300*l.* (a), for by stat. 21 & 22 Vict. c. 95, s. 10, it was enacted that where "it appears by affidavit to the satisfaction of a registrar of the principal registry, that the testator or intestate, in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to the said 'Court of Probate Act,' and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting any-

Stat. 21 & 22 Vict. c. 95, s. 10. Where personalty is under 200*l.*, County Court to have distribution.

(a) *i.e.*, the actual value of the property free from mortgages or other charges. *Davies v. Brecknell*, L. R. 2 P. & D. 177.

thing on account was at the time that the deceased was entitled beneficially to 300*l.* or upwards, jurisdiction in respect of his or her contentious business in respect of probate of the will of such deceased in relation thereto.

The Probate Court has jurisdiction in contentious business in administration of the estate of a deceased person, in place of abode of the deceased, in contentious jurisdiction in the cause to which the Court shall have jurisdiction, if the deceased had been married, in instance (b), applications for administration, 21 & 22 Vict. c. 95, s. 10.

Sections 21 & 22 Vict. c. 95, s. 10. Courts in relation to probate of the will of a deceased person, in County Court Rule Order that Rules are made by the High Court.

(b) See Stat. P. & D. 154. of the Court of probate cause.

thing on account of the debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seized or entitled beneficially of or to any real estate of the value of 300*l.* or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the Will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

The Probate Division has power in cases where, in any contentious business arising out of an application for probate or administration, it is shown that the state of property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, to send the cause to such County Court, and the judge of such County Court shall proceed therein as if such application and cause had been made to, and arisen in, his Court in the first instance (*b*). See 20 & 21 Vict. c. 77, s. 59 [extended to applications for the *revocation* of a grant of probate or administration, 21 & 22 Vict. c. 95, s. 12].

Power to remit
to County
Court.

Sections 55, 56, 57 and 59 of the Probate Act [stat. 20 & 21 Vict. c. 77], and sects. 10, 12 and 13 of the amending Act [stat. 21 & 22 Vict. c. 95] relate to the jurisdiction of County Courts in contentious business. The rules of practice regulating applications in respect of such contentious business in County Courts are contained in Order XLIX. of the County Court Rules, 1889, and it is provided by rule 12 of this Order that in proceedings under this Order, for which no Rules are hereby provided, the Rules and practice of the High Court shall be followed as far as they are applicable.

Stat. 20 & 21
Vict. c. 77,
ss. 55, 56, 57,
and 59.

Stat. 21 & 22
Vict. c. 95,
ss. 10, 12,
and 13.

County Court
Rules, 1889,
Ord. XLIX.

(*b*) See *Slater v. Alvey*, L. R. 2 P. & D. 154. As to the discretion of the Court to direct a trial of a probate cause in the County Court

against the wish of all parties, see *Dunn v. Dunn*, 1 Sw. & Tr. 521, and *Bull v. Bull*, 30 L. J., P. & M. 40n.

It should be observed that the above jurisdiction given to County Courts, in instances to which it extends, is concurrent with that of the Probate Division of the High Court, and not exclusive. See 20 & 21 Vict. c. 77, s. 59, and 21 & 22 Vict. c. 95, s. 12.

Stat. 20 & 21
Vict. c. 77,
s. 58.
Appeals from
County Court :

By sect. 58 of the Probate Act [stat. 20 & 21 Vict. c. 77] it was enacted, that "any party who shall be dissatisfied with the determination of the judge of the County Court in point of law or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate in such manner and subject to such regulations as may be provided by the Rules and Orders to be made under this Act, and the decisions of the Court of Probate on such appeal shall be final" (c).

to Divisional
Court.
R. S. C., 1883,
Ord. LIX.,
r. 4.

The appeal from the County Court under this section is now to a Divisional Court of the Probate, Divorce and Admiralty Division of the High Court of Justice. R. S. C. 1883, Order LIX., rule 4.

Jurisdiction of
County Courts
in non-conten-
tious business.
Stat. 36 & 37
Vict. c. 52,
s. 1 :

As to the Probate Jurisdiction of County Courts in *non-contentious* business, it has been enacted by stat. 36 & 37 Vict. c. 52, that—

"Where the whole estate and effects of an intestate shall not exceed in value the sum of 100*l.*, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the Registry of the Court of Probate having jurisdiction in the matter, may apply to the Registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said Registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit

(c) And see *Zenley v. Veryard*, Macleaur, L. R. 1 P. & D. 604.
L. R. 1 P. & D. 195. *Macleaur v.*

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(c) Godolph.
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the said papers by post to the Registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said Registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same, save as is provided by this Act" (sect. 1).

"The Registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant" (sect. 2).

"If the Registrar of the County Court has reason to believe that the whole estate and effects of which the deceased died possessed exceeds in value 100*l.*, he shall refuse to proceed with the application until he is satisfied as to the real value thereof" (sect. 3).

By sect. 4, Registrars of County Courts may exercise the powers of Commissioners of the Court of Probate.

"And the Act of 1875 (stat. 38 & 39 Vict. c. 27), which is to be read and construed along with and as part of the above recited Act (sect. 2), extends the provisions of the above Act to the surviving children of poor *widows* who die intestate' (sect. 1).

Stat. 38 & 39
Vict. c. 27.
Extension of
former Act.

SECTION II.

What the Executor may do before Probate.

Upon the principles stated in the course of the preceding section (p. 243), it has been held that the executor, before he proves the Will, may do almost all the acts which are incident to his office, except only some of those which relate to suits (e). Thus he may seize and take into his hands any

What executor
may do before
probate.

(e) Godolph. Pt. 2, c. 20, s. 1. Wankford v. Wankford, 1 Salk.
Wentw. Off. Ex. 81, 14th edition. 301. Humphreys v. Ingledon, 1 P.
Treat. on Eq. B. 4, Pt. 2, c. 1, s. 2. Wms. 753.

of the testator's effects (*f*), and he may enter peaceably into the house of the heir, for that purpose, and to take specialties and other securities for the debts due to the deceased (*g*). He may pay, or take releases of, debts owing from the estate (*h*); and he may receive or release debts which are owing to it (*i*); and distrain for rent due to the testator (*k*). And if, before probate, the day occur for payment upon bond made by, or to, the testator, payment must be made to, or by, the executor, though the Will be not proved, upon like penalty as if it were (*l*). So he may sell, give away, or otherwise dispose, at his discretion, of the goods and chattels of the testator, before probate (*m*); he may assent to, or pay, legacies (*n*); he may enter on the testator's terms for years (*o*), and he may gain a settlement by residing in the parish where the land lies (*p*).

These acts stand good, though he die without proving the Will.

And although he should die, after any of these acts done, without proving the Will, yet do these acts so done stand firm and good (*q*). Where a termor devised his term to another whom he made his executor and died; and the

(*f*) Godolph. Pt. 2, c. 20, s. 1. Wentw. Off. Ex. 81, 14th edition.

(*g*) Godolph. Pt. 2, c. 20, s. 3. Wentw. Off. Ex. 81, 14th edition.

(*h*) Godolph. Pt. 2, c. 20, s. 3. Wentw. Off. Ex. 81, 14th edition.

(*i*) Co. Litt. 202, *b*. Graysbrook v. Fox, Plowd. 281. Middleton's case, 5 Co. 28, *a*. Godolph. Pt. 2, c. 20, s. 1. Wentw. Off. Ex. 81, 14th edition. Wankford v. Wankford, 1 Salk. 306, 307. Wills v. Rich, 2 Atk. 285.

(*k*) Whitehead v. Taylor, 10 A. & E. 210.

(*l*) Godolph. Pt. 2, c. 2, s. 3, Wentw. Off. Ex. 18, 14th edition. The penalty is now saved by bringing the principal and interest and costs into Court, under stat. 4 Ann, c. 3, 16, Ruff. § 13.

(*m*) Godolph. Pt. 2, c. 20, s. 3. Wentw. Off. Ex. 82, 14th edition.

He may release or assign any part of the personal estate before probate: By Lord Macclesfield, 1 P. Wms. 768, Comber's case. It is consequently no objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment; Elwood v. Christy, 17 C. B., N. S. 754.

(*n*) Godolph. Pt. 2, c. 29, s. 1. Wentw. Off. Ex. 82, 14th edition.

(*o*) Rex v. Stone, 6 T. R. 298. Dyer, 367, *a*. And the executor of the grantee of the next avoidance of a church may grant the advowson before probate: Smithley v. Chomeley, Dyer, 135 *a*.

(*p*) Rex v. Stone, 6 T. R. 298.

(*q*) Wentw. Off. Ex. 82, 14th edit. Brazier v. Hudson, 8 Sim. 67.

devisee enter that the term and an executor if an executor yet the assent him are good never proves proving the executorship,

It must, however, although an executor term for years to a specific land yet, if it be not the assignee the right to can only be the evidence of the has already been appointed means, either died after the probate, letters be produced in

Again, although assignment a binding, yet

(*r*) Dyer, 367. 6 T. R. 298. Exch. 680.

(*s*) Johnson 516.

(*t*) Wankford Salk. 306, 507.

(*u*) By Lord v. Wankford, 1 whether, whether his creditor his

devisee entered and died without any probate; it was held that the term was legally vested in the executor by his entry, and an execution of the devise, without any probate (*r*). So if an executor assents to a legacy, and dies before probate, yet the assent is good enough (*s*). So all payments made to him are good, and shall not be defeated, though he dies and never proves the Will (*t*). In a word, the executor's not proving the Will does, upon his death, determine the executorship, but not avoid it (*u*).

It must, however, be carefully observed in this place, that although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to show the right to make the assignment or give the assent; which can only be effected by producing the probate, or other evidence of the admission of the Will in the Court: for, as it has already appeared, the fact of a particular person having been appointed executor to another can be proved by no other means, either in courts of law or equity (*x*). If the executor died after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead (*y*).

Again, although an executor can, before probate, make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-

If acts done by an executor before probate are relied on for title or sought to be enforced, a subsequent probate must be shown.

(*r*) Dyer, 367, *a*. Rex *v*. Stone, 6 T. R. 298. Fenton *v*. Clegg, 9 Exch. 680.

(*s*) Johnson *v*. Warwick, 17 C. B. 516.

(*t*) Wankford *v*. Wankford, 1 Salk. 306, 507.

(*u*) By Lord Holt, in Wankford *v*. Wankford, 1 Salk. 309. *Quære*, whether, when a debtor makes his creditor his executor, who dies

after having intermeddled with his goods, but before probate, and before any election made to retain, the executor of the executor may retain; see Croft *v*. Pyke, 3 P. Wms. 182, and *post*, Pt. III. Bk. II. Ch. II. § VI.

(*x*) See ante, p. 242.

(*y*) Johnson *v*. Warwick, 17 C. B. 516.

He cannot maintain actions before probate :

money till probate, because, till the evidence of title exists, the executor cannot give a complete indemnity (2).

An executor cannot maintain actions before probate unless such as are founded on his *actual* possession: for in actions where he sues in his representative character, he may be compelled, by the course of pleading, to produce the letters testamentary at the trial, or in some cases, by an application to the Court, at an earlier stage of the cause (a); and in those actions where he sues in his individual capacity, relying on his *constructive* possession as executor, although he does not name himself as executor in his declaration, nor make any profert, yet, generally speaking, it will be necessary for him to prove himself executor at the trial (b), which he can only do by showing the probate. For example, where an executor brings trespass *de bonis asportatis*, or trover, upon his testator's possession, and a conversion in his lifetime, he necessarily describes himself as executor in his declaration, and his character as such may be traversed: And where the goods were taken or converted after the testator's death, although, since the property in the goods draws to it a possession in law, he may declare on this *constructive* possession of his own, notwithstanding he has never had actual possession, without naming himself executor, still, if his

(2) *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583.

(a) *Webb v. Adkins*, 14 C. B. 401. This case was approved and followed in the late case of *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294, where a testatrix having endorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the Will was granted, issued a writ against the bankers for the return of the bill at its value. The bankers were always

willing to pay over the proceeds of the bill to the executors upon production of probate. Upon the defendants taking out a summons for an order that all proceedings in the action should be stayed on the ground that the same was frivolous, vexatious, and an abuse of the process of the Court, it was held that all proceedings in the action ought to be stayed until the plaintiffs obtained probate.

(b) *Blainfield v. March*, 7 Mod. 141, by Holt, C. J. 2 Saund. 47, note to *Wilbraham v. Snow*.

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title to the property should be put in issue by the pleadings, he must show that title as executor at the trial by producing the probate, in order to prove his constructive possession (c).

In cases, indeed, where the executor has *actually* been possessed of the property which is the subject of the action, before it came to the hands of the defendant, such possession is, according to the general principle, of itself sufficient, without showing any title, to establish a *prima facie* case, either in replevin, trover or trespass, when the property has come to the defendant's hands, or been converted, by tort (d), or in debt or assumpsit, when the defendant has acquired it by a contract with the executor (e). In such case it is evident that the actual possession of the plaintiff is a *prima facie* title, without reference to the circumstances under which such possession has been obtained, whether as executor or by any other means (f). Accordingly, in the case of *Oughton v. Seppings* (g), a sheriff's officer had seized and sold a pony, claimed by the plaintiff, a widow, under an execution against a third party, who lodged with her: The action was brought against the officer for money had and received, to recover the amount of the sale money: It appeared that the pony had been bought by the lodger for the plaintiff with money provided

except where
he has had
actual possession:

(c) *Hunt v. Stevens*, 3 Taunt. 113: And any defect in the probate, e.g., the want of a proper stamp, will be as fatal as the non-production: *Ibid.*

(d) *Wentw. Off. Ex.* 84, 14th edit. Plowd. 281, in *Graysbrook v. Fox*. See *Elliott v. Kemp*, 7 M. & W. 306, 312, 314.

(e) *Wentw. Off. Ex.* 84, 85, 14th edition.

(f) On this principle in a case, where three out of four executors made a sale of the goods of their testator, it was held that the three might sue without naming themselves executors, and without joining the fourth executor; although

the goods were sold as the goods of the testator: *Brassington v. Ault*, 2 Bing. 177. The distinction above pointed out might seem unnecessarily laboured in the present Treatise, had it not been laid down in previous works on the same subject as an absolute proposition that an executor may maintain actions of trespass or trover, before probate, for such of the effects of the testator as never came to his actual possession, taken or converted after the testator's decease. See *Toller*, 47. 2 *Roberts on Wills*, 172, 173.

(g) 1 B. & Adol. 241.

by her, but at that time, and for several months afterwards, her husband was alive: After his death, however, the plaintiff fed the pony, and paid bills for its hay and shoeing, though it was used as generally by the lodger as by her: No probate of Will or letters of administration were produced: It was objected, that assuming even that the plaintiff might have maintained trespass for the taking of the pony, she could not maintain this action, which was founded on a contract; and that the pony having been the property of the husband, passed on his death to his personal representative, and it had not been shown that the plaintiff was either executrix or administratrix. But it was held that there was evidence, though perhaps slight, that the plaintiff was in possession of the pony at the time it was seized; and if so, since she might clearly have maintained trespass against a wrong-doer, she might waive the tort, and maintain this action to recover the money produced by the sale (*h*).

nor can his
grantee:

And the law is the same with respect to the grantee of the executor. Accordingly, in an action of trover for a horse and gig, which the plaintiff claimed as the vendee of an executor, it was held, that as at the time of the trial the Ecclesiastical Court had not granted probate, and the executor had never had actual exclusive possession of the gig and horse, the plaintiff could not make out his title, though he produced the Will appointing his vendor executor (*i*). In this case, the plaintiff and defendant both claimed title to the property; and Lord Tenterden, in his address to the jury, observed, that if the plaintiff had proved a clear and undisputed possession, it might have been sufficient; but it appeared that the defendant, before and after the sale to the plaintiff, used the gig and horse.

but he may
commence an
action before
probate:

But although an executor cannot *maintain* actions before probate, except upon his actual possession, yet he may

(*h*) See also *Accord*. *White v. E. & B.* 749.
Mullett, 6 Exch. 713, 715; and (*i*) *Pinney v. Pinney*, 8 B. & C.
see further *Waller v. Drakeford*, 1 335.

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(*h*) *Wills v.*
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advance in them as far as that step where the production of the probate becomes necessary, and it will be sufficient if he obtains the probate in time for that exigency (*k*). Thus where he sues as executor, he may commence the action before probate (*l*): for, as it has been before observed, the probate, although obtained after action brought, shall, when produced, have relation to the death of the testator, so as to perfect and consummate the Will from that period (*m*). So where a reversion of a term comes to him, he may avow before probate for such rent as hath accrued after the death of the testator (*n*), and if such an issue is joined that it becomes necessary for him to prove his title by executorship (as for instance, if *non tenuit* should be pleaded), it will be sufficient if he obtains probate in time to produce it in evidence at the trial. So in the cases above considered, where the executor brings an action without naming himself executor, on his constructive possession, he may declare before probate, and if his title to the property be put in issue by the pleadings, he may take probate at any time before the trial, and that will enable him to support the action (*o*).

in some cases
he may avow
or declare be-
fore probate :

(*k*) *Wills v. Rich*, 2 Atk. 285.

Easton v. Carter, 5 Exch. 8, 14.

The Court may, however, make an order compelling him to produce the probate upon which he founds his right to maintain the action or stay proceedings until he places himself in a situation to do so. *Webb v. Adkins*, 14 C. B. 401. *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294.

(*l*) 1 Roll. Abr. 917, A. 2.

Martin v. Fuller, Comb. 871.

Wankford v. Wankford, 1 Salk.

302, 303. *Webb v. Adkins*, 14 C.

B. 401. But in cases where the

defendant does not dispute his

liability or the title of the execu-

tors to probate but merely requires

production of the probate before

paying the executor, the executor

ought not to sue, and the Court

will stay the action if he does.

See *Tarn v. Commercial Bank of*

Sydney, 12 Q. B. D. 294.

(*m*) *Plowden*, 231. 1 Roll. Abr.

917, A. 2.

(*n*) *Wankford v. Wankford*, 1

Salk. 307, *per Holt*, C. J. *White-*

head v. Taylor, 10 A. & E. 210.

(*o*) It is said an executor may

maintain a *quare impedit*, if he be

entitled to the next presentation

of a church, which became void,

without showing forth the Will :

Wentw. Off. Ex. 84, 14th edition.

But if by the course of the plead-

ings it should become a part of his

case to prove his title, he certainly

can only do so by producing the

he may commence action in Chancery Division before probate :

he may be petitioning creditor in bankruptcy before probate :

and may present winding-up petition :

So an executor, before probate, may commence an action in the Chancery Division (the bill, however, it was formerly said, must allege that he has proved the Will) (*p*), and the subsequent probate makes the action a good one, if obtained at any time before hearing (*q*).

An executor can be a petitioning creditor in bankruptcy, but he must obtain probate before he can get a receiving order (*r*).

It would seem also that the executor of a creditor of a company may present a winding-up petition under the Companies Act before he has obtained probate : it being sufficient if he has obtained probate before the hearing of the petition (*s*).

probate ; and it may be doubtful whether the passage above cited is, in any case, law, inasmuch as it should seem that executors must show their title in the declaration in *quare impedit*.

(*p*) *Humphreys v. Ingledon*, 1 P. Wms. 753. It seems, however, that an executor may, pending an application for probate, bring an action to protect the estate, by obtaining an injunction or otherwise, although he alleges in the statement of claim that he has not yet obtained probate. See *Newton v. Metropolitan Railway*, 1 Dr. & Sm. 583, *infra*, note (*q*).

(*q*) *Humphreys v. Humphreys*, 3 P. Wms. 351. And in the case of *Patten, Executrix, v. Panton*, in the Exchequer, 1793, it was said, *arguendo*, that it had been determined by that Court about three years ago, that it is sufficient if the probate were obtained at any time before hearing : 3 Bac. Abr. 53, by Gwillim, *Executors* (E.) 14. But a plea that the executor has not obtained probate was allowed, and the plea that the cause

must be considered as having gone on to be heard : *Simons v. Alman*, 2 Sim. 241. See also *Jones v. Howells*, 2 Hare, 353, per Wigram, V.-C. *Post*, Pt. v. Bk. I. Ch. II. In *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583, a bill by executors for a specific performance alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at that time when the motion, but for the press of business, would have been heard, there was no probate : but when the motion was actually heard, the probate was in Court ; and it was held by Sir R. Kindersley, V.-C., that the defendants could not resist the motion upon the ground of demurrer : See also *Beardmore v. Gregory*, 34 L. J., Ch. 392.

(*r*) See *ex parte Paddy*, 3 Madd. 241. *Rogers v. James*, 7 Taunt. 147, cases decided under the old Bankruptcy Acts.

(*s*) *Re Masonic & General Life Assurance Co.*, 32 C. D. 373.

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(*u*) *Blewitt v.*
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(*z*) *Dulwich*

On the other hand, if he have elected to administer, he may also, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible (*t*). So an action may be commenced against an executor, before probate, by a residuary legatee, for an account of the estate and effects of the testator, and to have the assets secured (*u*). So, before probate, an executor may be compelled to discover the personal estate of his testator, though a suit be pending respecting the validity of the Will (*x*).

he may be
sued before
probate.

If an executor die before probate, although, as already mentioned, the acts which he may legally do before probate stand firm and good, yet his executor may not prove both Wills, and so become executor to both the testators (*y*). But administration of the goods of the first testator, with the Will annexed to it, is to be committed to the executor of the executor, if the first executor be residuary legatee of the first testator; or to such other person as may be so appointed; otherwise to the next of kin of the first testator (*z*).

If he die be-
fore probate,
his executor
shall not be
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first testator.

(*t*) Wentw. Off. Ex. 86, 87, 14th edition. Plowd. 280. Toller, 49. It is clear upon the grounds which have already been stated (see p. 228), that if he has administered, he will be liable, not only before probate, but though he should refuse to take probate, and administration should be committed to another. See the observations of Best, C. J., in *Douglas v. Forest*, 4 Bingh. 704.

(*u*) *Blewitt v. Blewitt*, 1 Younge, 541.

(*z*) *Dulwich College v. Johnson*,

2 Vern. 49. See also *Phipps v. Steward*, 1 Atk. 285. *Fonbl. Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 2, n. b.* Since the passing of the Judicature Acts, actions for the sole purpose of obtaining discovery have become very rare.

(*y*) *Wankford v. Wankford*, 1 Salk. 308, in Lord Holt's judgment. S. C., 1 Freem. 520.

(*z*) *Isted v. Stanley*, Dyer, 372, *a.* Wentw. Off. Ex. 82, 14th edition. Godolph. Pt. 1, c. 20, s. 2. See *post*, Pt. I. Bk. v. Ch. III. § 1.



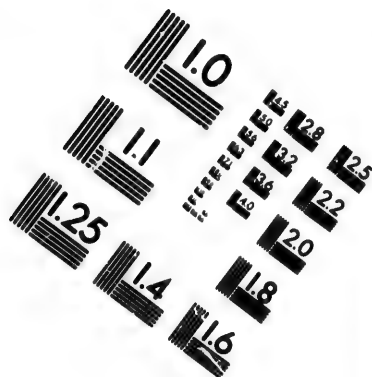
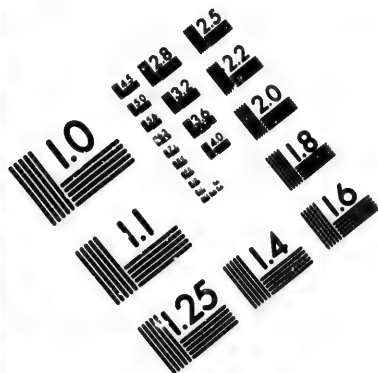
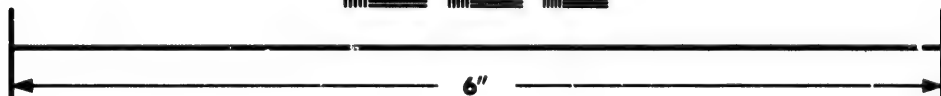
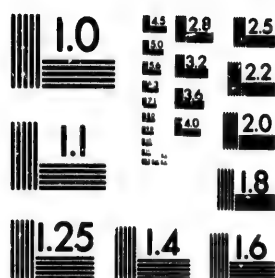


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CHAPTER THE SECOND.

OF THE MANNER OF OBTAINING PROBATE, AND THE PRACTICE
OF THE COURT WITH RESPECT THERETO.

SECTION I.

*By whom the Will should be proved: and herewith of the
Production and Deposit of Testamentary Papers.*

Executor alone
can prove Will.

The executor
may be cited
to prove by the
Ordinary.

Citation,
purpose of.

THE person alone by whom the testament can be proved is the executor named in it (a), whom (as before stated) the Court may cite to the intent to prove the testament, and take upon him the execution thereof, or else to refuse the same (b). This may the Court do, not only *ex officio*, but at the instance of any party having an interest, which interest is proved by the oath of the party.

A citation answers two purposes: it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it, the process provides a substitute for a voluntary renunciation on their part. Availing himself, therefore, of the rule, a person having an inferior interest, but unable to procure the renunciation of the persons who have the superior interest, cites all those persons who have such superiority to take the required grant, or show cause why it should not be made to himself.

Thus in the case of a Will, the residuary legatee cites the executor "to accept or refuse the probate and execution of the testator's Will, or to show cause why letters of administration with the Will annexed of the personal estate of the testator should not be granted to him (the residuary legatee)." And if there be also a residuary legatee in trust the party citant cites him "to accept or refuse letters of administration

(a) *Wankford v. Wankford*, 1 Godolph. Pt. 1, c. 20, s. 2. *Ante*, p. 225.

(b) *Swinb. Pt. 6*, s. 12, pl. 1.

Ch. II. §

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L. R. 1 P. & D.

(d) *Tristram*
Practice, 10th

(e) See In th
[1891] P. 323.

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A legatee or a creditor (c) similarly cites both the executor and the residuary legatees or the testator's next-of-kin if the residue has not been disposed of.

Before any citation can issue in respect of a Will, that Will must have been filed.

The party citing must therefore have previously obtained possession of the Will (d).

By the Court of Probate Act, 1857, s. 26, "The Court of Probate may, on motion or petition, or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court (e),

20 & 21 Vict.
c. 77, s. 26.
Order to
produce any
instrument
purporting to
be testamen-
tary.

(c) A creditor may cite the next of kin to accept administration though his right of action is barred by the Stat. of Limitations: In the goods of Coombs, L. R. 1 P. & D. 193.

(d) Tristram and Coote's Probate Practice, 10th edit. pp. 239, 240.

(e) See In the goods of Shepherd [1891] P. 323. The examination of a person respecting his knowledge of testamentary papers under this section must be either in open Court or on interrogatories, so there is no power to order his examination before the Registrar of the district where he resides: In the goods of

Laws, L. R. 2 P. & D. 458. But if he be proved by affidavit to be unable from illness to attend to be examined in open Court, the Court has power under this section to order his attendance to be examined *viâ voce* before a commissioner: Banfield v. Pickard, 6 P. D. 33. The Court will not order the attendance for examination in open Court of the attesting witnesses to a Will because they may have declined to give information as to the circumstances attending the execution of the same: Evans v. Jones, 36 L. J., P. & M. 70.

or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of any such motion, petition, or other proceeding (f), shall be in the discretion of the Court."

"1 & 22 Vict.
c. 95, s. 23.
Registrar may
issue sub-
pœnas.

Further, by stat. 21 & 22 Vict. c. 95, s. 23, it is enacted that "It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena requiring any person to produce and bring into the principal or any district registry, or otherwise as in the said subpoena may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpoena, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing (g).

(f) On a motion for attachment of a person served with a subpoena under this section to bring in a testamentary paper and failing to comply with it, the party proceeded against must receive notice of the application in the first instance: *Baigent v. Baigent*, 1 P. D. 421.

(g) Where a subpoena has been personally served upon a person to bring in a testamentary paper, and such person fails to comply

therewith, the Court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in Court to be examined in reference to his possession of such paper: *Parkinson v. Thornton*, 37 L. J., P. M. 3. And where an executor who had intermeddled with the estate but did not take probate of the Will, had been cited to do so and had not obeyed the citation, the Court refused to

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(h) *Tristram* Practice, 10th 294. Lord v 580. Balch

The practice with regard to citations in non-contentious business is in all respects the same as that which prevailed before the passing of the Judicature Acts. Not having been affected by them in any way it continues in force as before (*h*). For rules relating to the practice in this respect, see Probate Rules of 1862 (Non-contentious), Rules 68--70.

Practice with regard to citations in non-contentious business.

It has been more than once laid down by Lord Eldon, that the lien of an attorney or solicitor does not extend to the original Will executed by his client; and that he cannot refuse the production of it (*i*).

Solicitor who prepared the Will has no lien on it.

In *Brown v. Coates* (*j*), Sir John Nicholl strongly inclined to an opinion, that a mere holder of a Will, monished to bring it into the Prerogative Court, could not be allowed to dispute the jurisdiction, and put the other party to proof of *bona notabilia*, prior to giving up the Will.

Holder of a Will not allowed to dispute jurisdiction.

Disputed Wills ought to be lodged in the Registry of the Court for custody. On one occasion Sir John Nicholl observed (*k*), "Practitioners have no right to keep Wills in their possession. I have, in several instances, stated, that the expense necessary to get a Will out of the hands of a party must fall upon those who withhold it."

Disputed Wills ought to be lodged in the registry.

It has been the constant practice of the Court, to order all testamentary papers to be brought in when required. And a duplicate is a part of a Will, and to be considered a testamentary paper within this rule (*l*).

Order to bring in all testamentary papers.

Whether the Will respected personal estate only, or whether it was a mixed Will, concerning both lands and goods, it was,

Deposit of Will in registry:

order an attachment in the first instance, but directed that a peremptory order should be served to take probate within ten days: *Mordaunt v. Clarke*, L. R. 1 P. & D. 392.

Russ. 87. He engages to make a Will effectual for the purposes of the testator; which it cannot be unless it is produced elsewhere: *Jacob*, 581. See also *Ex parte Law*, 2 A. & E. 45.

(*h*) *Tristram and Coote's Probate Practice*, 10th edit. 246.

(*j*) 1 Add. 345.

(*i*) *Georges v. Georges*, 18 Ves.

(*k*) *Cunningham v. Seymour*, 2 Phillim. 250.

294. *Lord v. Wormleighton*, Jac.

(*l*) *Killican v. Parker*, 1 Cas. temp. Lee, 662.

380. *Balch v. Symes*, 1 Turn. &

when and how
it can be got
out.

20 & 21 Vict.
c. 77, s. 66.

Place of
deposit of
original Wills.

after probate, deposited, together with all other testamentary papers, in the Registry of the Ecclesiastical Court in which it had been proved. And now, by the 66th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), "there shall be one place of deposit under the control of the Court of Probate, at such place in London or Middlesex as Her Majesty may by order in Council direct, in which all the original Wills brought into the Court or of which probate or administration with the Will annexed is granted under this Act in the principal registry thereof, and copies of all Wills the originals whereof are to be preserved in the district registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the Court and subject to the rules and orders under this Act" (m). If it should be needed in order to be

(m) By sect. 67, "The judge shall cause to be made from time to time in the principal registry of the Court of Probate calendars of the grants of probate and administration in the principal registry, and in the several district registries of the Court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration with the Will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects; and the calendars to be so made shall be printed as the same are from time to time completed."

By sect. 68, "The registrars shall cause a printed copy of every calendar to be transmitted through the Post or otherwise, to each of the district registries, and to the office of Her Majesty's Prerogative in Dublin, the office of the Commissary of the county of Middlethian in Edinburgh, and such other offices, if any, as the Court of Probate shall from time to time by rule or order direct; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."

By sect. 69, "An official copy of the whole or any part of a Will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the Will

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put in evidence in some other judicial proceeding, the attendance of the registrar, or other proper officer, with it must be procured. In some cases, an order of the Court of Chancery has been obtained that it shall be delivered out by the registrar on giving security to return it (*n*). And the Ecclesiastical Court itself has, on several occasions, ordered the Will to be delivered out of its Registry for the legal purpose of its being sent to the proper place for its custody (*o*). The last of these orders (*p*) appears to have been a decree that the Will and codicils of Napoleon Bonaparte should be delivered out (after notarial copies had been made) in order to be sent to the legal authorities in France to be recorded there in the proper place.

But with respect to cases where it was formerly necessary to produce the original Will, in order to establish a devise of real estate, it is enacted by stat. 20 & 21 Vict. c. 77 (Court of Probate Act), s. 64, that on notice being given of intending to put the probate in evidence, the probate shall be sufficient evidence of the Will and its validity, unless the other party shall give notice that he intends to dispute the validity of the Will.

This subject, and the enactment contained in the 62nd section of the same statute, that the probate shall be conclusive of the validity of the Will, in all proceedings affecting the real estate, where the probate has been granted after proof in solemn form, &c., will be considered hereafter (*q*), together with the general doctrine of the effect of probate.

has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act."

(*n*) See *post*, § IX.

(*o*) *Post*, § VII.

(*p*) *In re* Napoleon Bonaparte, 2 Robert. 606.

(*q*) *Post*, Pt. I. Bk. VI. Ch. I.

Stat. 20 & 21
Vict. c. 77,
s. 64 :

probate to be
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Will in suits as
to real estate,
unless the
validity of the
Will is dis-
puted.

Stat. 20 & 21
Vict. c. 77,
s. 62.

SECTION II.

When the Will is to be proved.

A Will cannot be proved in the lifetime of the testator.

20 & 21 Vict. c. 77, s. 91. As to depositories for safe custody of the Wills of living persons.

Time within which the Will ought to be proved.

I the testator be yet living, the judge may not proceed to the proving of his testament; because it is of no force as long as the testator lives, who also may revoke or alter the same at any time before his death (*r*).

Now by 91st section of the Probate Act, 1857, (20 & 21 Vict. c. 77,) it is enacted, that "One or more safe and convenient depository or depositories shall be provided, under the control and directions of the Court of Probate, for all such Wills of living persons as shall be deposited therein for safe custody: and all persons may deposit their Wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct."

The time, after the testator's death (*s*), when the Will is to

(*r*) Swinb. Pt. 6, s. 13, pl. 1.

(*s*) If the death of the party cannot be proved by sufficient witnesses, recourse must be had to the presumption of law; for which see Swinb. Pt. 6, s. 13, pl. 2. Godolph. Pt. 1, c. 20, s. 3. Dean *v.* Davidson, 3 Hagg. 554. In the goods of Hutton, 1 Curt. 595. Or in the case of a person long absent, and in parts far remote, and transmarine, to common fame: Swinb. Pt. 6, s. 13, pl. 2. Godolph. Pt. 1, c. 20, s. 3. In the Common Law Courts, a jury may presume that a man is dead at the expiration of seven years from the time when he was last known to be living: *per* Lord Ellenborough, in *Doe v. Jesson*, 6 East, 84. See also, as to this presumption, *Doe v. Nepean*, 5 B. & Adol. 86. S. C. on error, 2 M. & W. 894. Taylor on Evid. 8th edit. 218 *et seq.* In

the goods of Turner, 3 Sw. & Tr. 476. *Re Tindall's Trust*, 30 Beav. 151. *Re Beasley's Trusts*, L. R. 7 Eq. 498. *Re Rhodes*, 36 C. D. 586. *Re Corbishley*, 1 C. D. 846. There is no legal presumption as to the time of his death: *Doe v. Nepean*, *ubi supra*. In the goods of Smith, 2 Sw. & Tr. 508. *Thomas v. Thomas*, 2 Dr. & Sm. 298. *Re Rhodes*, 36 C. D. 586. Where a legatee has not been heard of for seven years his death will be presumed, and the onus of proving that he survived the testator lies upon those who claim under him. See *Re Benham's Trusts*, L. R. 4 Eq. 416. *Re Phené's Trusts*, L. R. 5 Ch. 139. *Re Walker*, L. R. 7 Ch. 120. *Hickman v. Upsall*, L. R. 20 Eq. 136. Therefore in a case where a legatee under the Will of a testator who died in February

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The doctrine

be proved is somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the Will, the quality of the executors, the absence of the witnesses, the importunity of creditors and legatees, and other circumstances incident thereto. And by stat. 55 Geo. III. c. 184. s. 37, it is enacted, that "if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the Will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the stamp-duty payable on the probate of the Will, or letters of administration of the estates and effects of the deceased.

Penalty under 55 Geo. III. c. 184, s. 37, for administering without obtaining probate or letters of administration.

The penalty now substituted for that imposed by the above section is one of double the amount of duty chargeable, which is a debt due to the Crown, and is recoverable by any of the ways or means in force for the recovery of probate, legacy or succession duty (*t*).

Penalty now in force in substitution for above.

1860, left England in 1858, and was last heard of by a letter from Australia, dated in January, 1859, and where the legacy had been paid into Court, and in 1870 the residuary legatee petitioned for payment to himself on the ground that in the absence of proof that the legatee had survived the testator, the legacy must be taken to have lapsed, *Malins, V.C.*, ordered the money to be paid to the residuary legatee, and the Court of Appeal affirmed the decision: *Re Lewes' Trusts*, L. R. 8 Ch. 356. The doctrine of presumption, how-

ever, does not seem to have been ever applied to cases where the person whose death is to be presumed is neither the person whose estate is to be administered nor a legatee, *e.g.* a husband who, if alive, would have been entitled to administration as next of kin of his deceased wife: In the goods of Clark, 15 P. D. 10.

(*t*) Customs and Inland Revenue Act, 1881, 44 Vict. c. 12, s. 40. Proceedings may also be taken under stat. 28 & 29 Vict. c. 104, s. 57, as to which see *post*, Pt. I. Bk. VII.

Rule 43, P. R.
1862.

By rule 43 of the "General Rules and Orders for the Registrars of the Principal Registry (made in 1862)," "No probate or letters of administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars."

Rule 45.

And by rule 45, "in every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory the registrars are to require such proof of the alleged cause of delay as they may see fit."

SECTION III.

Of the Practice of the Court of Probate, and herewith of the Proof of Wills in Common Form.

20 & 21 Vict.
c. 77. s. 13.
District Regis-
tries to be
established.

By the Court of Probate Act, 1857, 20 & 21 Vict. c. 77, s. 13, "There shall be established for each of the districts specified in Schedule (A.) to this Act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the Court of Probate, hereinafter referred to as 'The District Registry.'"

S. 46.
Probates and
administration
may be granted
in common
form by Dis-
trict Regis-
trars, if it shall
appear by affi-
davit that the
testator, &c.,
had a fixed
place of abode.

By the 46th section of the same statute, "Probate of a Will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate, and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, and such place of abode being stated in the affidavit, and such probate or letters of administration

Ch. II. §

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shall have effect over the personal estate of the deceased in all parts of *England* accordingly (u).

And by sect. 47, "Such affidavit shall be conclusive for the purpose of authorizing the grant by the district registrar of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death, and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required."

By sect. 48, "The district registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form."

And by sect. 49, "Notice of every application to any district registrar for the grant of probate or administration, shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall specify the name and description, or addition [if any], of the testator or intestate, the time of his death, and the place of his abode at his decease, as stated in the affidavit made in support of such application, and the name of the person by whom the application has been made, and such other particulars as may be directed by rules or orders under this Act; and no probate or administration shall be granted in pursuance of such application until such district registrar shall have received a certificate under the hand (x) of one of

S. 47.

Affidavit to be conclusive for authorizing grant of probate.

S. 48.

District Registrar not to make grants when there is a contention.

S. 49.

As to transmission of notice of application for grants of probate, &c., to District Registrar.

(u) It is not obligatory to apply for probate or administration to any district registry, but the application may, in every case, be made

to the principal registry. See sect. 59 of the Probate Act, 1857.

(x) By stat. 21 & 22 Vict. c. 95, s. 26, the certificate need not be

the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said registrar of the principal registry shall forward as soon as may be to the district registrar; all such notices in respect of applications in the district registries shall be filed and kept in the principal registry, and the registrars of the principal registry shall, with reference to every such notice, examine all notices of such applications which may have been received from the several other district registries, and the applications which may have been made for grants of probate or administration at the principal registry, so far as it may appear necessary to ascertain whether or no application for probate or administration, in respect of the goods of the same deceased person, may have been made in more than one registry, and shall communicate with the district registrars as occasion may require in relation to such applications."

S. 51.
District registrars to transmit lists of probates and administrations and copies of Wills.

And by sect. 51, "On the first *Thursday* of every month, or oftener, if required by any rules or orders to be made in that behalf, every district registrar shall transmit to the registrars of the principal registry a list in such form and containing such particulars as may be from time to time required by the Court of Probate, or by any rules or orders under this Act, of the grants of probate and administration made by such district registrar up to the last preceding *Saturday*, and not included in a previous return, and also a copy certified by the district registrar to be a correct copy (*y*), of every Will to which any such probate or administration relates."

S. 52.
District Registrars to preserve original Wills.

And by sect. 52, "Every district registrar shall file and preserve all original Wills of which probate or letters of administration, with the Will annexed, may be granted by him, in the public registry of the district subject to such

under the hand, but may be issued under a stamp provided for that purpose, and approved of by the Judge of the Court.

(*y*) By stat. 21 & 22 Vict. c. 95, s. 25, these copies may be certified and transmitted under a stamp provided for that purpose.

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regulations as the Judge of the Court of Probate may from time to time make in relation to the due preservation thereof and the convenient inspection of the same."

By sect. 29, "The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court" (z).

By sect. 30, "And to the intent and end that the procedure and practice of the Court may be of the most simple and expeditious character, it shall be lawful for the Lord Chancellor, at any time after the passing of this Act, with the advice and assistance of the Lord Chief Justice of the Court of Queen's Bench, or any one of the judges of the superior courts of law to be by such Chief Justice named in that behalf, and of the Judge of the said Prerogative Court, to make rules and orders to take effect when this Act shall come into operation for regulating the procedure and practice of the Court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious, and what shall be deemed non-contentious business, and, subject to the express provisions of this Act, for fixing and regulating the time and manner of appealing from the decisions of the said Court, and generally for carrying the provisions of this Act into effect; and after the time when this Act shall come into operation, it shall be lawful for the Judge of the Court of Probate from time to time, with the concurrence of the Lord Chancellor and the said Lord Chief Justice, or any one of the judges of the superior courts of law to be by such Chief

Stat. 20 & 21
Vict. c. 77,
s. 29.

Practice of the
Court to be ac-
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S. 30.
Rules and
orders to be
made for regu-
lating the
procedure of
the Court.

(z) Sir C. Cresswell appears to have been of opinion that this section applies to the procedure only of the Court, and not to the principles on which it is to act. In

the goods of Oliphant, 1 Sw. & Tr. 525. See also *Belbin v. Skeats*, 1 Sw. & Tr. 148; 27 L. J., P. & M. 56; *Braine v. Braine*, 1 Sw. & Tr. 271; 29 L. J., P. & M. 151.

Justice named in this behalf, to repeal, amend, add to or alter any such rules and orders as to him, with such concurrence as aforesaid, may seem fit."

38 & 39 Vict.
c. 77, s. 18.
Rules of Pro-
bate, Divorce
and Admiralty
Courts to re-
main in force.

And now by sect. 18 of the Judicature Act, 1875, it is enacted that. "All rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, *except so far as they are expressly varied by the first schedule hereof, or by rules of Court made by order in council before the commencement of this Act* (a), shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act.

Jurisdiction of
President of
Probate, &c.,
Division to
make rules as
to non-con-
tentious probate
business.

"The President for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the judge of the Probate Court by 20 & 21 Vict. c. 77, sect. 80."

Under the powers conferred by 20 & 21 Vict. c. 77, s. 80, already referred to, a great many very copious, minute, and explicit rules and orders were, in the years 1862 and 1863, made for the guidance of practitioners in the Court of Probate, both in respect of contentious and non-contentious business, and for the instruction as well of the principal registrars as of the district registrars, together with a very large collection of forms. As to which it is thought more expedient to refer to the books of practice (b), than, by inserting them, to encumber this Treatise by such a very long statement as would be requisite for that purpose (c).

(a) The words in italics are repealed by the Stat. Law. Rev. Act, 1883.

(b) Tristram & Coote's Probate

Practice, 10th edit.

(c) The Judicature Acts do not appear to have altered the procedure or practice of the Court of

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These rules, orders, and directions are for the most part founded on the doctrines and practice previously established in the Prerogative Court with regard to the making, &c. of Wills, which have already been stated in the progress of this work.

A testament may be proved in two ways; either in Common Form, or by Form of Law; which latter mode is also called the Solemn Form, and, sometimes, proving *per testes* (d).

Ways of
proving a
Will:
i. Common
Form:
ii. Solemn
Form.
Common
form.

A Will is proved in common form, when the executor presents it before the judge, and in the absence, and without citing the parties interested, produces witnesses to prove the same; who testifying, by their oaths, that the testament exhibited is the true, whole, and last Will and testament of the deceased, the judge thereupon, and sometimes upon less proof, does annex his probate and seal thereto (e).

If the Will be perfect on the face of it, and there is an attestation clause, reciting that the solemnities required by the statute 1 Vict. c. 26, s. 9, have been complied with (e.g. "signed and declared by the above-named testator, as and for his last Will and testament, in the presence of us present at the same time, who, in his presence and in the presence of

Manner of
obtaining pro-
bate in
common
form (f).

Probate with respect to non-contentious business. Nor do they alter or enlarge the *jurisdiction* of the Court of Probate in non-contentious matters. In the goods of Tomlinson, 6 P. D. 209. But in the goods of Gunn, 9 P. D. 242, 244, Sir James Hannen said, "It appears to me that a very great change has been worked now by the fusion of all the Courts into one. There is no difference between the law to be administered in this (Probate) division and elsewhere, but each Court is to ascertain what the law is, whether legal or equitable, and I think therefore it is open to me to estab-

lish a different basis to that which existed in the Probate Court. I am of opinion that where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted."

(d) Swinb. Pt. 16, s. 14, pl. 1. Godolph. Pt. 1, c. 20, s. 4.

(e) Swinb. Pt. 6, s. 14, pl. 2. Godolph. Pt. 1, c. 20, s. 4.

(f) For practical directions for obtaining grant of probate in common form, see Browne's Probate Practice, rev. edit. 906, *et seq.*

Where no or
imperfect at-
testation
clause.

each other, have hereunto set our names as witnesses thereto. John Styles, Richard Nokes"), probate in common form may be obtained upon the oath of the executor alone.

But if there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed ceremonies, an affidavit is required from one of the subscribing witnesses, by which it must appear that the Will was executed in compliance with the statute (*g*). But this rule may be dispensed with, if the witnesses, after diligent inquiry, are not forthcoming (*h*).

Where it appears from the affidavits, the attestation clause being imperfect, that the Will was not properly attested by the witnesses under the statute, the Court cannot decree administration to pass to the effects of the deceased as *dead intestate*; for there might be collusion: All that the Court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper; as notwithstanding the Court declines to grant probate, the Will might be propounded and established (*i*).

Probate of
Wills exhibit-
ing alterations
and obliteration-
tions.

If a Will, bearing date on or after January 1, 1838, has upon the face of it any unattested obliteration, interlineation, or alteration, the practice is to require an affidavit, showing whether they were made before or after the execution of the Will (*k*).

(*g*) In the goods of Johnson, 2 Curt. 341. In the goods of Batten, 7 Notes of Cas. 290. Rule 4, P. R. 1862 and 1871 (Non-Contentious Business). Where one of the witnesses deposed that the Will was signed in the presence of himself and the other witness, the other witness having no recollection as to the fact, probate was allowed: In the goods of Hare, 3 Curt. 54. See also *ante*, p. 91.

(*h*) In the goods of Luffman, 5 Notes of Cas. 183. In the goods of Dickson, 6 Notes of Cas. 278. As to the course to be adopted

when no affidavit is obtainable, see Rule 7, P. R. 1862 (Non-Contentious).

(*i*) In the goods of Ayling, 1 Curt. 913. See also In the goods of Watts, 1 Curt. 594. Rule 5, P. R. 1862 (Non-Contentious). If on perusing the affidavit or affidavits setting forth the facts of the case it appear doubtful whether the Will or codicil has been duly executed, the registrar may require the parties to bring the matter before the Judge on motion. Rule 6.

(*k*) Rules 3, 9, 10, and 11, P. R.

Where made before copy of the proper place terated. B may be affected Court will o appears to h such a proba inquire whe such circum should seem that the obli made, the d its original made after in the Temp its execution alterations the *fac simi* to show the case where a and I also gi out down to

(Non-Contentious) of the subscrie suffice, if he c But if none they should al number, join the goods of T of Cas. 146. I depose negativ the practice is join in the a that he cannot or other evide bate will be gr it originally etc nesses join in must depose to W.E.—VOL

Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the Will *fair*, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the Will may be affected by the appearance of the original paper, the Court will order the probate to pass in *fac simile* (l). And it appears to have been sometimes supposed that the grant of such a probate leaves it open to a Court of Construction to inquire whether such alterations of the Will were made under such circumstances as to be effectual (m). But it is plain, it should seem, that unless the Court of Probate had adjudged that the obliterations or other alterations had been effectually made, the decree would have been for probate of the Will in its original state. A *fac simile* probate, therefore, of a Will made after the Wills Act came into operation is conclusive in the Temporal Courts, that the Will was in that state before its execution, *i.e.* that the testator duly executed it with the alterations or cancellations upon it (n). And the object of the *fac simile* is that the alterations, &c., may possibly help to show the meaning of the testator: As, for example, in a case where a testator says, "I give A. B. an annuity of 500*l.*, and I also give him 1,000*l.*:" and the testator then strikes out down to and including the words "500*l.*" (o).

Probate in
fac simile.

(Non-Contentious Business). One of the subscribed witnesses will suffice, if he can speak positively. But if none of them can do so, they should all, whatever be their number, join in the affidavit: In the goods of Townshend, 5 Notes of Cas. 146. If none of them can depose negatively or affirmatively, the practice is for the executor to join in the affidavit and depose that he cannot adduce any further or other evidence, and then probate will be granted of the Will as it originally stood. When two witnesses join in one affidavit, both must depose to the due execution:

In the goods of Batten, 7 Notes of Cas. 200. See *ante*, p. 123, as to probate where words are completely obliterated.

(l) See *post*, Pt. I. Bk. VI. Ch. I. In the goods of Raine, 34 L. J., P. M. & A. 125. In the goods of Smith, 3 Sw. & Tr. 889.

(m) See the argument of Sir R. Bethell in *Shea v. Boschetti*, 18 Beav. 321. 3 De G. M. & G. 778, 779.

(n) *Gann v. Gregory*, 3 De G. M. & G. 777. *Post*, Pt. I. Bk. VI. Ch. I.

(o) *Gann v. Gregory*, 3 De G. M. & G. 780. Suppose, again, the

Probate after citation of persons interested to propound a later paper.

In a case where a testator, having duly executed a Will, made a later one, betraying on the face of it insanity, the executors of the earlier Will took out a decree calling on all persons interested in the later paper to propound it, with an intimation that, on not appearing, the Court would decree probate of the earlier Will: The persons cited, executed proxies declining to propound the later paper, and consenting to probate of the earlier one: And Sir H. Jenner Fust accordingly decreed probate of it in common form, without the later paper having been propounded at all, and said that the course which had been taken was that which ought to be adopted in all similar instances (*p*).

SECTION IV.

Proof of Wills in Solemn Form, or per Testes.

Proof in solemn form; contentious business.

Action now substituted for former citation.

Proof in solemn form under the old practice:

This is a part of the "contentious business" of the Court (*pp*), which now commences by the issue of a writ of summons in an action which is substituted for the citation formerly used.

When a Will is to be proved in solemn form, it is now, in accordance with the old practice, requisite that such persons as have interest (that is to say, the widow and next of kin of

words "to be equally divided amongst them" interlined (without any *caret* to show where they were intended to come in), and in such a position that they are applicable to two sets of legatees: In such a case, it should seem, there must, of necessity, be a *fac simile* probate.

(*p*) *Palmer v. Dent*, 2 Robert. 284.

(*pp*) R. S. C. 1883, Ord. II. Rule 1. The practice in Contentious business seems now to be governed by the Judicature Acts

and Rules, together with the Rules and Orders of 1862 (Contentious Business) made under the authority of the Probate Court Act and the old practice inherited by the Probate Court from the Prerogative Court, save in so far as the same have been altered by the Judicature Acts and Rules: *Kennaway v. Kennaway*, 1 P. D. 148; which case shows that notwithstanding the substitution of a writ of summons for the initial citation the former practice as to citing to see proceedings still obtains.

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According to the Act, 1857, modes of proceedings of persons of and pleas.

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the deceased, to whom the administration of his goods ought to be committed, if he died intestate) should be cited to be present at the probate and approbation of the testament.

According to the practice under the Court of Probate Act, 1857, declarations and pleas were substituted for the old modes of pleading. Now, by the new Judicature Acts, statements of claim and defences are substituted for declarations and pleas. under the new practice.

By Rule 4 of the Rules and Orders, 1862 (Contentious), "Executors or other parties who, previously to the passing of the 'Court of Probate Act, 1857,' might prove Wills in solemn form of law, shall be at liberty to prove Wills under similar circumstances, and with the same privileges, liabilities, and effect, as heretofore."

Rule 5.—"Next of kin and others, who, previously to the passing of the said Act, had a right to put executors or parties entitled to administration with Will annexed upon proof of a Will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore."

Rule 6.—"Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore."

The difference between the common form and the solemn form, with respect to citing the parties interested, works this diversity of effect: *viz.* that the executor of the Will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form (*q*). Thus, a probate of a codicil

The executor may, after proof in common form, be cited to prove the Will *per testes*.

(*q*) Godolph. Pt. 1, c. 20, s. 4. Indeed, Swinburne, Pt. 6, s. 14, pl. 4, seems to consider ten years as the limit within which the executor may be compelled to prove: but this probably is a typographical

mistake for thirty: see 4 Burn. E. L. 318, Phillimore's edit. However, in *Hoffman v. Norris* (Prerog. 1805), reported in a note to *Newell v. Weeks*, 2 Phillim. 231, Sir Wm. Wynne says, "I do not

but not when
already proved
in solemn
form.

The executor
himself may
prove the Will
in solemn form
in the first
instance.

granted in common form 1808, was upon the citation of the executor by a next of kin to prove it *per testes* in due form of law, revoked in 1818 (*r*), and one granted in 1807, by a similar proceeding revoked in 1820 (*s*). So that if the witnesses be dead in the meantime, it may endanger the whole testament. Whereas, the testament being proved in solemn form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament still retains its full force (*t*).

Hence, not only are Wills proved in solemn form, at the instance of persons who desire to invalidate them; but the executor himself may, and in prudence often does, for greater security, propound and prove the Will, in the first instance, *per testes*, of himself, citing the next of kin, and 'all others pretending interest in general,' to "see proceedings;" which being done, the Will shall not be set aside afterwards (provided there be no irregularity in the process) when the witnesses are dead (*u*).

know that there is any specific time that limits a party." See also *Merryweather v. Turner*, 3 Curt. 802, 817. In the goods of Topping, 2 Robert. 620, by Sir J. Dodson, *Accord*. But where a party who is thus entitled to call in the probate and put the executor to proof of the Will, chooses to let a long time elapse before he takes this step, he is not entitled to any indulgence at the hands of the Court: He is entitled to have the law strictly administered and to nothing beyond it: *Blake v. Knight*, 3 Curt. 553. And under such circumstances the Court (having regard to the infirmity of the witnesses' memory after the lapse of time) is, it should seem, somewhat astute to discover circumstances whereupon to found an inference that the formalities re-

quired for a due execution of the Will have been gone through. See the cases collected, *ante*, p. 91.

(*r*) *Satterthwaite v. Satterthwaite*, 3 Phillim. 1.

(*s*) *Finucane v. Gayfere*, 3 Phil. 405.

(*t*) *Swinb.* Pt. 6, s. 14, pl. 4.

(*u*) 1 Ought. tit. 6, s. 5, tit. 222, s. 1, 2. *Lister v. Smith*, 3 Sw. & Tr. 53. Where an executor has proved the Will in Common Form, a party desirous of putting him to proof in Solemn Form commences an action for revocation, having first cited the executor to bring in the probate. If the executor desires to sustain the Will, he must either plead and propound it in the action for revocation, or he must commence an action himself to obtain proof in Solemn Form.

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But the executors cannot be allowed to issue a citation against the legatees under a codicil, which they do not believe to be a true codicil of the deceased, calling on them to propound and prove it if they think fit. The proper course is for the executors to prove the Will in solemn form, and cite the next of kin and the asserted legatees under the codicil to see the Will proved (*x*).

The next of kin, as such merely, are entitled to call for proof in solemn form of the deceased's Will, of common right. And the mere acquiescence of a next of kin to the probate being taken in the common form is no bar to the exercise of this right, even though he has received a legacy as due to him under the Will; for he is still at liberty to call in the probate, and put the executor on proof of that identical Will *per testes* (*y*). A strong instance of this occurs in the case of *Core v. Spenser* (which was decided in the Prerogative Court of Canterbury, in 1796) (*z*), where Spenser, the executor, was cited to bring in the probate of a Will, taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that Will for five of the eight years; and she, Core herself, her mother dying at the end of the fifth year, for the remaining three: Spenser, in that case, appeared under protest, and contended that Core was barred from putting him on proof of the Will: But the Court thought otherwise, and overruled the protest. However, long acquiescence, unaccounted for by any special circumstances, and acts done by a next of kin under the provisions of the Will, may (if no fact appears which excites a reasonable suspicion of the genuineness or validity of the Will) amount to such a waiver of his rights, as to preclude him from putting the Will in suit (*a*). But where a Will of

The executor may be compelled to prove in solemn form by a next of kin, who has acquiesced and received a legacy:

(*x*) In the goods of Benbow, 2 Sw. & Tr. 488.

(*y*) Bell v. Armstrong, 1 Add. 370. Merryweather v. Turner, 3 Curt. 802.

(*z*) 1 Add. 374, in Sir J. Nicholl's judgment in the case of Bell v.

Armstrong.

(*a*) Hoffman v. Norris, 2 Philim. 230, in a note to Newell v. Weeks. Braham v. Burchell, 3 Add. 257, 258. See also Merryweather v. Turner, 3 Curt. 802.

the deceased having been found in which the plaintiff was named executor, he gave notice thereof to the defendant, who was about to obtain a grant in the goods of the deceased as interested under a previous Will, and entered a caveat, and before the caveat had been warned and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to the defendant that he did not seek to establish his Will, and administration with the earlier Will annexed issued to the defendant, and subsequently the plaintiff took out a citation calling upon the defendant to bring in the administration and show cause why it should not be revoked, the Court held that the plaintiff was not precluded from continuing a suit to determine which was the last Will of the deceased (b).

but he must
bring his
legacy into
Court :

And before a legatee, who has received all or part of his legacy, can be permitted thus to dispute the Will, he must bring into Court the amount of the legacy paid to him, to abide the event of the suit (c).

Legatee who
has renounced
administration
with the Will
annexed :

A legatee who has renounced administration *cum testamento annexo*, as legatee and next of kin, whereupon it has been granted to another, is not barred by such renunciation from contesting the Will; and he may therefore cite such administrator to bring the letters of administration into Court to prove the Will by witnesses, or to show cause why the deceased should not be pronounced to have died intestate, and why administration should not be granted to himself (d).

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But when the executor propounds and proves the Will, *per testes*, of himself, duly citing the next of kin "to see proceedings," all next of kin so cited are, generally speaking, thereby for ever barred; and if he so propounds and proves the Will against *certain* only of the deceased's next of kin, without having cited them all to see proceedings, the others, even

(b) *Goddard v. Smith*, L. R. 3 P. & D. 7.

(c) *Bell v. Armstrong*, 1 Add. 374. *Braham v. Burchell*, 3 Add. 256, 257. *Secus*, where the legatee

is a minor : *Goddard v. Norton*, 5 Notes of Cas. 76.

(d) *Gascoyne v. Chandler*, 2 Cas. temp. Lee, 241.

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though uncited, if to a certain extent privy to and aware of the suit, shall not put the executor on proof *per testes* of the Will, so once already proved, a second time (e).

It is clearly established that before a person can be permitted to contest a Will, the party propounding has a right to call on him to show that he has some interest (f).

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. Thus where a testator disposed of all his personal estate by his Will and gave his real estate, but none of his personal, to his brother's children, and by a codicil he gave them pecuniary legacies, revoking the devise to them of the real estate which was of greater value than the legacies; it was held that they might oppose the codicil alone, notwithstanding their only right to a share of the personalty was under it (g). Though a next of kin may, as such, oppose all the testamentary papers, he has not a right to oppose any particular one he may think fit; for some interest in it, however remote, is necessary (h).

A creditor has only a right to have a *constat* of the estate

What interest a party must have to entitle him to oppose a Will.

A creditor cannot dispute the validity of a

(e) *Newell v. Weeks*, 2 Phillim. 224. *Bell v. Armstrong*, 1 Add. 372. Accordingly it was held by Sir C. Cresswell, that a next of kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between the executor and another next of kin, ending in the establishment of the Will, is not at liberty in any way to oppose probate of such Will being taken: and where on a verdict, the Court had pronounced for a Will, and a next of kin so situated had entered a caveat, the Court directed probate to issue, in spite of the caveat, and condemned the next of kin in costs: *Ratcliffe v. Barnes*, 2 Sw. & Tr. 486. But this rule does

not apply to a case where the parties to the suit compromise it and the decree is founded on the compromise. *Wytherley v. Andrews*, L. R. 2 P. & D. 327.

(f) *Hingston v. Tucker*, 2 Sw. & Tr. 596. But when two persons oppose a Will, one cannot call upon the other to propound his interest. *Ibid*.

(g) *Kipping v. Ash*, 1 Robert. 270. See also *Dixon v. Allinson*, 3 Sw. & Tr. 572. But see the observations of Sir C. Cresswell on the first named case in *Crispin v. Doglioni*, 2 Sw. & Tr. 17.

(h) *Baskcomb v. Harrison*, 2 Robert. 118. S. C. 7 Notes of Cas 275.

Will, unless he has had a grant of administration :

but when administration is granted to him he may oppose a Will :

and this without costs.

Court not obliged *ex officio* to order citation to next of kin.

A legatee cannot set up a Will which has been pronounced against after being litigated by next of kin, or by the executor of another Will.

According to old practice next of kin was not liable to costs, when he compelled the executor to prove *per testes* :

of the deceased, to see whether there are assets sufficient to pay the debts ; but he cannot controvert the validity of a Will ; for it is indifferent whether he shall receive his debt from an executor or an administrator ; and if a creditor was admitted to dispute the validity of a Will, it would create infinite trouble, expense, and delay to executors (i).

But when administration has been granted to a creditor, he may oppose a Will ; he is the same for this purpose as the next of kin (k).

And he may contest a Will without costs ; because he is the appointee of the Court and defends in that character, and does not appear simply as a creditor (l).

If nobody, who has a right, appears to oppose the Will, the Court is not obliged, *ex officio*, to order a citation to issue to call the next of kin (m).

A legatee cannot set up a Will, after it has been litigated between the executor and next of kin, or between the executor and the executor of another Will, and pronounced against, unless he can show the parties agreed to set aside the Will by fraud or collusion (n). But if he is afraid the executor will not do justice, he may intervene for his interest pending the suit (o), but apparently not after the hearing (p).

According to the old practice of the Prerogative Court, when an executor had been called upon by a next of kin to prove the Will *per testes*, and had sufficiently proved it, if the party who caused him to do this merely cross-examined the witnesses produced in support of the Will, he was not subject

(i) *Burroughs v. Griffiths*, 1 Cas. temp. Lee, 544. *Menzies v. Pulbrook*, 2 Curt. 845.

(k) *Dabbs v. Chisman*, 1 Phillim. 159, 160, *per curiam*.

(l) *Menzies v. Pulbrook*, 2 Curt. 851.

(m) *Burroughs v. Griffiths*, 1 Cas. temp. Lee, 544.

(n) *Bittleston v. Clark*, 2 Cas.

temp. Lee, 250. *Hayle v. Hasted*, 1 Curt. 236 : or unless, as it is said, there has been neglect or mismanagement in the conduct of the suit : 1 Curt. 240.

(o) *Bittleston v. Clark*, 2 Cas. temp. Lee, 250.

(p) *Peters v. Tilley*, 11 P. D. 145. See the judgment of Butt, J., in this case, p. 149.

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to costs, generally speaking (q). A next of kin, might however, exercise his undoubted right in this matter so vexatiously, as to make himself responsible, if not wholly, in part for the costs of his opponent (r). And there was a difference between next of kin, who are favourites of the Court, and the legatees under a former Will; for, though such a legatee might call for proof, *per testes*, of a Will, by which his interests under a former Will were prejudiced, and might interrogate the witnesses produced in support of that Will, he did this at the risk of being condemned in costs, if the Court had reason to suspect him of undue litigation (s).

Where an executor, who had obtained probate of a former Will, or a creditor who had a grant of administration, opposed a later Will, he had the same right to do so without being subject to costs, as where a Will was opposed by next of kin (t). But costs might be decreed against a party who had taken probate of a Will which he knew was not the last Will of the deceased (u).

By the Rules of the Supreme Court of Judicature, 1883. Order XXI., rule 18, which now govern the procedure and practice of the Probate Division upon this point, it is enacted

(q) 1 Oughton, tit. 6, s. 7. Reeves v. Freeling, 2 Phillim. 56. Urquhart v. Fricker, 3 Add. 56.

(r) Urquhart v. Fricker, 3 Add. 57: As where a next of kin acquiesced in the probate, and received his legacy, and then, after a considerable interval, cited the executor to prove the Will: Bell v. Armstrong, 1 Add. 375. And where a next of kin and residuary legatee under a prior Will, suing *in forma pauperis*, put the executor of a later Will to proof *per testes*, after seven years' acquiescence in the probate, and the proofs then adduced were perfectly clear and satisfactory; the Court condemned the party in costs, suspending the taxation while he continued a pau-

per: Wagner v. Mears, 2 Hagg. 524.

(s) Urquhart v. Fricker, 3 Add. 58: See also on this subject, Mansfield v. Shaw, 3 Phillim. 22. Boston v. Fox, 29 L. J., P. M. & A. 68, from which cases it appears that the executor of a former Will has the same right as a next of kin. This right, however, does not extend to a residuary legatee under a former Will. Hockley v. Wyatt, 7 P. D. 239.

(t) 1 Phillim. 160, note (e) to Dabbs v. Chisman. See also Lovett v. Harkness, 1 Cas. temp. Lee, 332.

(u) Martin v. Robinson, 2 Cas. temp. Lee, 535.

secus, of a legatee under prior Will:

And so it was as to an executor who had obtained probate of a former Will, or creditor who had a grant of administration.

The practice now governed by R. S. C. 1883, Order XXI., rule 18, as to costs.

that "the party opposing a Will may with his defence give notice to the party setting up the Will, that he merely insists upon the Will being proved in solemn form, and only intends to cross-examine the witnesses produced in support of the Will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate."

This rule re-enacts Rule 41 (Contentious Business), the practice under which was that a next of kin who availed himself of this rule was in the same position (x) as a next of kin in the Prerogative Court, *i.e.*, not liable to costs (y): But, if he called witnesses in support of pleas of undue execution, and incapacity, or the like, his liability to costs was in the discretion of the Court, and he was not, generally speaking, condemned in costs, if there was a reasonable ground for litigation (z). But a failure to establish pleas of undue influence and fraud was, as a general rule, followed by condemnation in costs (a).

But it should be observed that where an action in the Probate Division is tried by a Jury, the costs follow the event unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order. R. S. C. 1883, Order LXV. rule 1 (b).

(x) If the party opposing a Will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by the above rule 41, and the question of costs is left to the discretion of the Court. *Bone v. Whittle*, L. R. 1 P. & D. 249. See also *Leeman v. George*, L. R. 1 P. & D. 542.

(y) *Cleare v. Cleare*, L. R. 1 P. & D. 655. There may be cases, however, where he will be condemned in costs. *Beale v. Beale*,

L. R. 3 P. & D. 179.

(z) *Bramley v. Bramley*, 3 Sw. & Tr. 430. *Ferrey v. King*, 3 Sw. & Tr. 51. *Tippett v. Tippett*, L. R. 1 P. & D. 54. *Smith v. Smith*, L. R. 1 P. & D. 239.

(a) *Summerell v. Clements*, 3 Sw. & Tr. 35. *Bone v. Whittle*, L. R. 1 P. & D. 249. See also *Ireland v. Bendall*, L. R. 1 P. & D. 194. *Harrington v. Bowyer*, L. R. 2 P. & D. 264.

(b) See *Morris v. Freeman*, 3 P. D. 65; *Foley v. Brogan*, 11 L. R. Ir. Ch. D. 421.

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Very material alterations in the law, with respect to probate in solemn form of Wills relating to real estate, were effected by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). One of the great objects of that Act was to prevent the possibility of a double trial on the same Will: And accordingly it is enacted by sect. 61, that where the validity of a Will affecting real estate is disputed, on proving it in solemn form or any other contentious cause, the heir-at-law, devisees, &c., shall be cited. And by sect. 62, after proof in solemn form, or where the validity of the Will is otherwise decided on, the decree of the Court shall be binding on all persons interested in the real estate.

But by sect. 63, it is provided that the probate, decree or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

These sections and others connected with and following them will be found stated verbatim, and the whole subject of the probate of disputed Wills affecting real estate will be considered, in a subsequent part of this Treatise (c), together with the inquiry as to the effect of probate generally.

The position of an heir-at-law cited under the 61st section is similar to that of the next of kin when cited to see proceedings in the Prerogative Court, and therefore, though if he contents himself with putting the executor to proof of the Will, and cross-examining the witnesses, is not liable to costs; if he places pleas of undue influence and fraud on the record, and fails in proof of them, he is liable to costs (d).

The inquiry as to the cases in which costs will be decreed out of the estate of the deceased, and the general question as to when the unsuccessful party will be condemned in costs, will be discussed hereafter (e).

20 & 21 Vict.
c. 77, s. 61.
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S. 62.
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Liability to
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(d) Pt. I. Bk. VI. Ch. I., p. 478.

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(d) *Fyson v. Westrope*, 1 Sw. &

(e) Pt. I. Bk. IV. Ch. II. § VII.

Rule 78.
Order for cita-
tion of heir,
&c.

It remains to be mentioned in this place that by Rule 78 (Contentious Business), it is ordered that "any person proceeding to prove a Will in solemn form, or to revoke the probate of a Will, may, if the Will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorizing him to cite the heir or heirs-at-law or other person or persons having or pretending interest in such real estate to see proceedings; and the judge or registrar on being satisfied by affidavit that the Will in question does affect or purport to affect the real estate, will make an order authorizing the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid; provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires" (f).

SECTION V.

Evidence in Testamentary Causes.

It is now proposed to consider some rules of evidence with respect to the admission of disputed Wills to probate.

Court of Probate Act, 1857, s. 33.
Rules of evidence in common law Courts to be observed.

Competency of executor.
1 Vict. c. 26, s. 17.

By the Court of Probate Act, 1857 (21 & 22 Vict. c. 77, s. 33), "The rules of evidence observed in the Superior Court of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court of Probate."

By stat. 1 Vict. c. 26, s. 17, it is enacted, "That no person shall, on account of his being an executor of a Will, be in-

(f) Where an executor propounds the latter of two Wills, the Court will direct a citation to issue against the devisees under the earlier Will and against the heir-at-law, although already before the Court as defendant in the suit: *Lister v. Smith*, 3 Sw. & Tr. 53. The fact of one co-heir being an

infant and child of a plaintiff is no ground for the Court refusing to allow such co-heir to be cited: *Nichols v. Binns*, 1 Sw. & Tr. 19. In this case Sir C. Cresswell observed, that the 61st and 63rd sections do not seem quite consistent: The former is more imperative in its terms than the latter.

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competent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof."

This section renders an executor, who is also entitled to a legacy in that character, a competent witness to support the Will, if he has released his legacy (*g*).

And now, by stat. 6 & 7 Vict. c. 85 (which was held to apply to proceedings in the Ecclesiastical Court) (*h*), competency is conferred on interested witnesses generally; and by stat. 14 & 15 Vict. c. 99, s. 2, on parties to suits; and by stat. 16 & 17 Vict. c. 83, s. 1, on husbands and wives of parties.

By stat. 17 & 18 Vict. c. 47, "In any suit or proceeding depending in any Ecclesiastical Court in England or Wales, the Court (if it shall think fit) may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the Court shall direct."

By stat. 20 & 21 Vict. c. 77, s. 81, "Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary, the parties, in all contentious matters, where their attendance can be had, shall be examined orally by or before the judge in open Court; provided always, that, subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party, orally in open Court as aforesaid; and after such cross-examination, may be re-examined, orally in open Court as aforesaid, by or on behalf of the party by whom such affidavit was filed."

Executor who is also legatee is a competent witness if he has released his legacy.

Competency of witnesses and parties under 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

17 & 18 Vict. c. 47. Witnesses may be summoned and examined *vivâ voce*.

Mode of taking evidence in contentious matters under Court of Probate Act, 1857, s. 31.

(*g*) *Munday v. Slaughter*, 2 Curt. 72.

(*h*) This Act did not repeal any of the provisions of the Wills Act.

Sect. 32.
Court may
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orders for ex-
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And by sect. 32, it is provided, "That where a witness in any such matter is out of the jurisdiction of the Court, or where, by reason of his illness or otherwise (i), the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose; and all the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, chapter sixty-three, and of the first year of King William the Fourth, chapter twenty-two, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise, applicable to such examination, and the witnesses examined, shall extend and be applicable to the said Court of Probate, and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were one of the Courts of Law at Westminster, and the matter before it were an action pending in such Court."

Attesting wit-
nesses :

not necessary
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Formerly the general rule was, that if a party be put to proof of a Will, he must examine the attesting witnesses.

But since the passing of the Court of Probate Act, 1857, section 88 (k), it has not been necessary to call both the attesting witnesses to prove the execution; for in the Courts of Law the execution of a Will may be proved by calling one only of the attesting witnesses (l).

(i) See *Brown v. Brown*, L. R. 1 P. & D. 720.

(k) See *ante*, p. 284.

(l) *Belbin v. Skeats*, 1 Sw. & Tr. 148. *Forster v. Forster*, 33 L. J., P. M. & A. 113. *Powman v.*

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In the Ecclesiastical Courts on affidavit that an attesting witness had been diligently sought, and could not be found, an executor might pray publication; but the other party had a right to a monition against the witness to attend for cross-examination, if they could discover him (*m*).

There has already been occasion to show (*n*) that a Will may be admitted to probate, as duly executed under the Wills Act, notwithstanding the attesting witnesses may have no recollection at all as to the circumstances attending the execution, or notwithstanding one only should affirm and the other negative, or even both should negative a compliance with the statute, or the capacity of the testator (*o*).

The Ecclesiastical Court always allowed witnesses skilled in the examination of handwriting and detection of forgeries to depose to their opinion, *upon comparison* of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; whereas, in the Common Law Courts, this mode of evidence was rejected until the passing of the stat. 17 & 18 Vict. c. 125 (*p*).

Hodgson, L. R. 1 P. & D. 362. But where the party propounding a Will, in a contested suit called one of the attesting witnesses who gave evidence against the due execution, Sir C. Cresswell held that he was bound to call the other attesting witness: *Owen v. Williams*, 32 L. J., P. M. & A. 159. See also *Coles v. Coles*, L. R. 1 P. & D. 70.

(*m*) *Mynn v. Robinson*, 1 Hag. 68. Where the attesting witness is dead, or insane, or absent in a foreign country, or not amenable to the process of the superior Courts, or where he cannot be found after diligent enquiry, evidence of the witness's handwriting has always been admissible: *Roscoe's Nisi Prius Evi-*

dence, 14th edit. p. 131. In a suit for revocation of probate on the grounds of undue influence and incapacity where it appeared that every effort had been made to find one of the attesting witnesses but without success, the Court allowed the affidavit made by him eight years before at the time of proving the Will in the District Registry to be admitted as evidence of execution and capacity: *Gornall v. Mason*, 12 P. D. 142. See also *Millar v. Sheppard*, 2 Cas. temp. Lee, 520, as to proving the handwriting of a witness when residing in an enemy's country.

(*n*) *Ante*, p. 91, *et seq.*

(*o*) See *ante*, p. 31, *et seq.*

(*p*) By sect. 27, "Comparison of a disputed writing with any

Practice in Ecclesiastical Courts where attesting witness could not be found.

Doctrine of Ecclesiastical Courts as to mode of proving handwriting:

in Common Law Courts prior to Common Law Procedure Act, 1854.

Rule that on proof of signing, instructions and knowledge of the contents shall be presumed :

Generally speaking, where there is proof of signature, every thing else is implied till the contrary is proved ; and evidence of the Will having been read over to the testator, or of instructions having been given, is not necessary (q) : for when an instrument has been executed by a competent person, it must be presumed that the party so executing knew the contents and the effect of the instrument, and that he intended to give that effect to it (r).

writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses ; and such writings, and the evidence of the witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

(q) *Billinghurst v. Vickers*, 1 Phillim. 187, 191. *Cleare v. Cleare*, L. R. 1 P. & D. 655.

(r) *Fawcett v. Jones*, 3 Phillim. 476. *Wheeler v. Alderson*, 3 Hagg. 587. *Browning v. Budd*, 6 Moo. P. C. 435. The burden of proof that a testator knew and approved of the contents of a Will propounded is upon the person who propounds it : *Cleare v. Cleare*, L. R. 1 P. & D. 655. And if it be proved or admitted that a testator is of sound mind, memory and understanding, that a Will has been read over to him, or that he has read it to himself and that he has put his signature to it, the question whether he knew and approved of the contents of such Will must be answered in the affirmative : *Atter v. Atkinson*, L. R. 1 P. & D. 665. But there is no unyielding rule of law (especially when the ingredient of fraud enters into the case) that when it has been proved that a

testator, competent in mind, has had a Will read over to him and has thereupon executed it, all further enquiry is shut out: *Fulton v. Andrew*, L. R. 7 H. L. 44. See also on the question of testator's knowledge and approval of the contents of a Will, the case of *Goodacre v. Smith*, L. R. 1 P. & D. 359. Approbation will have the effect of prior instructions : *Forfar v. Heastie*, 2 Ch. temp. Lee, 310. *Durnell v. Corfield*, 1 Robert. 56. Moreover, a testator may, if he likes, authorize another person to make a will for him and may say, "I do not know what you have put down, but I am quite ready to execute it," and such a Will would be admitted to probate : *per Sir C. Creswell*, *Cunliffe v. Cross*, 3 Sw. & Tr. 38. Accordingly that learned judge held a plea that the alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased, at the time of the execution of the alleged codicil, was ignorant of the contents thereof, to be bad on demurrer : *Cunliffe v. Cross*, 3 Sw. & Tr. 37. If a testatrix has given instructions for her Will and it is prepared in accordance with them, the Will will be valid, though at the time of execution the testatrix

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Thus, although the rule of the Roman Law that "*Qui se scripsit heredem*" could take no benefit under a Will, does not prevail in the law in England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased (s).

where the legatee is the writer of his legacy:

Where the testator is blind, it must be proved that the contents of the Will were known to the deceased: for his execution, or other acknowledgment of the Will, is not sufficient, and the same, where from want of education, or from bodily affliction, he is unable to read (t).

where the testator is blind or cannot read:

So it is an established rule in the Spiritual Court, that where the capacity of the testator is doubtful at the time of execution, there must be proof of instruction, or of reading over, or other satisfactory evidence, of some kind, that he knew and approved of the contents of the Will (u). But this

where the capacity of the testator is doubtful:

merely recollects that she has given those instructions but believes that the Will is in accordance with them: *Parker v. Felgate*, 8 P. D. 171. See also *Middlehurst v. Johnson*, 30 L. J., P. M. & A. 14. But see *contra Hastelow v. Stobie*, L. R. 1 P. & D. 64. 35 L. J., P. M. & A. 18. S. C. 11 Jur., N. S. 1039, where Sir J. P. Wilde held a plea "that the deceased did not know and approve of the contents of the Will" to be good. See also *Cleare v. Cleare*, L. R. 1 P. & D. 655. *Sutton v. Sudler*, 3 C. B. (N. S.) 88, 99. But it may be doubted whether the view taken by Sir C. Cresswell is not more correct. It is surely a somewhat harsh construction of the law that a man shall not be

allowed to confide in his friend or solicitor, and depute him to draw up his Will, and adopt it when so drawn up, without ascertaining what the contents of it are; particularly in Wills containing complicated limitations it would seem to be unjust to require that the testator should understand each limitation, which the solicitor, in whom he has confided, has thought proper to insert.

(s) See *ante*, p. 99. *Dufaur v. Croft*, 3 Moore, P. C. C. 136. *Durnell v. Corfield*, 1 Robert. 51. *Barry v. Butlin*, 2 Moo. P. C. 480. *Fulton v. Andrew*, L. R. 7 H. L. 448.

(t) *Ante*, pp. 13, 14. See Rule 71, P. R. 1862 (Non-contentious).

(u) *Ante*, p. 100. *Billinghurst*

rule only applies, or at least only applies with any stringency, where the instrument is inofficious, *i.e.* not consonant to the testator's natural affections and moral duties, or where it is obtained by a party materially benefited (*x*). In a case where a Will had been propounded in a *condidit*, and the three attesting witnesses only had been examined: The testatrix was upwards of eighty years of age and very infirm; she was deaf and almost blind; and the instrument had been drawn up from directions given by the executor, who was partially the residuary legatee, and no instructions were proved to have been given by the deceased: Sir H. Jenner Fust pronounced against the validity of the Will, not on the supposition of any fraud having been practised, but on the ground of failure of proof (*y*).

seaman's Will
in favour of
his agent.

Where the alleged Will of a seaman is in favour of his agent, there must be clear proof not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect (*z*).

Proof of Will
by mere evi-
dence of hand-
writing of
attesting wit-
nesses.

Under certain circumstances, the validity of a Will may be established by proving the handwriting of the attesting witnesses, though no evidence can be given, either of instructions, or of the handwriting of the deceased (*a*).

Parol evidence
respecting the
intention of
the testator, as
to what shall
operate as and
compose his
Will:

In a Court of Construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator (*b*): But in the Court of Probate the inquiry is not so limited; for there the intentions of the deceased, as to what shall operate as, and compose his Will, are to be collected from all the circumstances of the case

v. Vickers, 1 Phillim. 193. *Barry v. Butlin*, *ante*, p. 99. *Mitchell v. Thomas*, 6 Moo. P. C. 137; *Browning v. Budd*, 6 Moo. P. C. 430.

(*x*) *Brogden v. Brown*, 3 Add. 449.

(*y*) *Sankey v. Lilley*, 1 Curt. 402. See also *Harwood v. Baker*, 3 Moo.

P. C. C. 282. *Dufaur v. Croft*, 3 Moo. P. C. C. 136.

(*z*) *Zacharias v. Collis*, 3 Phillim. 202.

(*a*) *Anderson v. Welch*, 1 Cas. temp. Lee, 577.

(*b*) See *Re Bywater*, 18 C. D. 17.

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taken together (c). They must, however, be circumstances existing at the time the Will is made (d).

Therefore, if there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted, under some circumstances, in the Court of Probate, to explain the intention of the testator. By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it: As, whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge: whether a codicil was meant to republish a former or a subsequent Will (e): or whether a codicil, purporting on its face to confirm other codicils of dates subsequent to that of its own execution, was correctly dated (f): these are matters of ambiguity upon the *factum* of the instrument.

receivable if there is an ambiguity on the *factum*:

what is such an ambiguity:

But it was considered as a rule in the Prerogative Court,

the ambiguity must be on the face of the instrument:

(c) *Greenough v. Martin*, 2 Add. 243. *Methuen v. Methuen*, 2 Phillim. 426. In the goods of English, 3 Sw. & Tr. 586. *Robertson v. Smith*, L. R. 2 P. & D. 43. *Jenner v. Finch*, 5 P. D. 106. See also the cases collected, *ante*, p. 95, note (e).

(d) *Stockwell v. Ritherdon*, 1 Robert. 661, 658. 6 Notes of Cas. 415, per Sir H. J. Fust: but in *Gould v. Lakes*, 6 P. D. 1, it was held that statements of a testatrix whether made before or after the execution of the Will are admissible to show what papers constitute the Will.

(e) *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461, note (g). There the testator left a Will, dated 13th Dec. 1800, and a codicil all in his own handwriting beginning, "This is a codicil to my last Will and testament of the 10th Jan. 1798, and I do hereby

ratify and confirm my said Will:" On the part of the executors it was alleged that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former Will, which it was to be presumed had been destroyed, as it could not be found: Parol evidence was admitted to prove this allegation, and show this mistake: and the codicil was pronounced a codicil to the Will of December, 1800.

(f) In the goods of Thomson, L. R. 1 P. & D. 8. In the case of *Reffell v. Reffell*, L. R. 1 P. & D. 139, the Court held that parol evidence is admissible to prove that a Will was executed on a date other than that which appears upon the face of it.

and be completely removed by the proposed proof: when no ambiguity on face of the instrument, parol evidence inadmissible.

that, in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be upon the face of the paper; and further, the facts alleged and to be proved must completely remove that ambiguity (*g*). When no ambiguity whatever appears upon the face of the instrument, the Court will not admit parol evidence: Thus in the case of *Fawcett v. Jones* (*h*), the allegation stated in substance that the residuary clause of the Will was not co-extensive with the instructions given by the party deceased, and the allegation also contained an averment, (which it was proposed to support by parol evidence only), suggesting that such variation was not made by any directions received from the deceased, nor with his privity or knowledge, but through mere error and oversight of the drawer, and of the testatrix herself; and the Court was prayed to pronounce for the part of the instructions so alleged to have been omitted as part of the Will: But Sir John Nicholl, in a very elaborate judgment, in which all the previous cases upon the subject are collected and commented upon, refused to admit the allegation, on the ground that the Will had been regularly executed, and there was no ambiguity apparent upon the face of it.

It was said that as to undue omissions or insertions in Wills, the result prior to the Wills Act of the authorities connected with this subject is, that where these two conditions are satisfied, *viz.* 1. Some absurdity or ambiguity on the face of the Will ascribable to something either omitted or inserted; and 2. Clear and satisfactory proof that the insertion or omission was contrary to the intention of the testator; the Court is at liberty, and even bound, to pronounce for the Will, not in its actual state, but with such error first reformed or corrected, either by the insertion of the passage omitted, or by the omission of that inserted.

Omissions cannot be supplied from the in-

With respect to Wills made on and after January 1, 1838,

- (*g*) *Fawcett v. Jones*, 3 Phillim. 570: and see *Sandford v. Vaughan* 434. *Draper v. Hitch*, 1 Hagg. 1 Phillim. 128.
678. *Harrison v. Stone*, 2 Hagg. (*h*) 3 Phillim. 434.
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it is plain that, by reason of the provisions of the stat. 1 Vict. c. 26, the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the Act: Whence it follows, that the Court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends (i). The Court, however, has power, if words have been inserted in a Will by fraud (k), or by mistake, without the knowledge of the testator (l) to correct the error by omission of words so inserted and, to negative the knowledge of the testator, to

structions in any case in Wills made after Jan. 1, 1838.

1 Vict. c. 26.

Power of Court to correct error in case of fraud or mistake without knowledge of testator.

(i) In the goods of Wilson, 2 Curt. 853. *Stanley v. Stanley*, 2 Johns. & H. 491. *Harter v. Harter*, L. R. 3 P. & D. 11. See also *Birks v. Birks*, 4 Sw. & Tr. 23, 31; 34 L. J., P. M. & A. 92, *per* Sir J. P. Wilde. *Guardhouse v. Blackburn*, 1 Law Rep. P. & D. 109, where that learned judge stated the general rules which, since the Wills Act, ought to govern questions of this nature.

(k) *Allen v. McPherson*, 3 Phil. 455. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116.

(l) In the goods of Duane, 2 Sw. & Tr. 590. In the goods of Oswald, L. R. 3 P. & D. 162. A testator, in the instructions for his Will, directed that all his B. shares should be given to his nephews, but the word "forty" was inserted several times in the Will before the word "shares," and the Will was executed with that word repeated several times before the word "shares." The jury found that the word "forty" was introduced by mistake, that the clauses including the word were never read over to the testator, and that he only approved of the Will on the supposition that all his B. shares were given to his nephews, and thereupon the Court ordered that the

word "forty" wherever it occurred should be struck out. *Morrell v. Morrell*, 7 P. D. 68. So where a testator in giving instructions for the preparation of his Will directed that a bequest of £10,000 should be given to each of his unmarried daughters "Georgiana" and "Florence," and the conveyancer who prepared the Will by inadvertence inserted the name "Georgiana" in both clauses of the Will relating to gifts to unmarried daughters and omitted the name of "Florence" altogether, it was held that probate of the Will omitting the name of "Georgiana" in the second clause of the gift might be granted to the executors. The draft was not read over to the testator at any time, but he did read what professed to be an epitome of it, such epitome being in accordance with the instructions. In the goods of Boehm [1891], P. 247. Apart from fraud, the fact that a Will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with its execution, be held conclusive evidence that he approved of, as well as knew, the contents thereof. *Guardhouse v. Blackburn*, L. R. 1 P. &

refer to the instructions, but the Court has no power to supply words accidentally omitted from a Will (*m*).

Verdict in ejectment : inadmissible in a testamentary cause.

In what cases the declarations of the testator are admissible in evidence.

Declarations made before execution of Will admissible.

A verdict in an action of ejectment, brought for the purpose of trying the validity of a Will as to realty, was not admissible in an allegation in a testamentary cause, respecting the same Will, in the Ecclesiastical Court (*n*).

Not only when the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the Will, the declarations of the testator are admissible in evidence respecting his dislike or affection for his relations, or those who appear in the Will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property (*o*). So it was held by the Court of Q. B. in *Doe v. Palmer* (*p*), that, in order to rebut the presumption which, as there has already been occasion to mention (*q*), exists that unattested alterations appearing on the face of a Will were made after the execution, it is allowable to give evidence of declarations of the testator, made before the execution, of his intention to provide by his Will for a person who would be unprovided for without the alterations in question (*r*): But that Court further held his declarations inadmissible, which were made after the execution, to the effect that the

D. 109, 116. *Fulton v. Andrew*, L. R. 7 H. L. 448. But where the rejection of part alters the sense of the remainder, *quære*, whether there is a valid Will within the meaning of 1 Vict. c. 26, s. 9. *Rhodes v. Rhodes*, 7 A. C. 192.

(*m*) *Harter v. Harter*, L. R. 3 P. & D. 11. But in the case of *In the goods of Bushell*, 13 P. D. 7, Butt, J., granted probate of a Will with the word "Bristol" substituted for "British" inserted in the Will by mistake in copying the Will: the Will not having been read over to the testator. And in *In the goods of Huddleston*, 63 L. T. N. S. 255, the word "including" was

substituted for "excluding."

(*n*) *Grindall v. Grindall*, 3 Hagg. 259.

(*o*) *Doe v. Palmer*, 16 Q. B. 747, 759.

(*p*) *Ib.*, 747.

(*q*) *Ante*, pp. 112, 213.

(*r*) See also *Dench v. Dench*, 2 P. D. 60. So where the name of the executor appointed by a Will was written on an erasure, the Court admitted a declaration of the testator as to the person he had appointed executor, made before the execution of a codicil which referred to the Will. In the goods of *Sykes*, L. R., 3 P. & D. 26.

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alterations had been made previously: And Lord Campbell, in giving the judgment, said, the Court could not be guided alone by the consideration that both parties claimed under the testator; for his declarations, made after a time when a controverted will is supposed to have been executed, would not be admissible to prove that it had been duly signed and executed as the law requires (*s*). In many cases the declarations of a testator made after a Will has been executed are admissible and are most important, *e.g.*, in questions as to testamentary capacity and fraud (*ss*). Declarations of the testator have been deemed admissible to prove the fact of the destruction of a Will, even in cases where no fraud or misconduct is imputed (*t*).

Declarations made after execution of Will inadmissible.

Upon a question between heir and devisee as to the competency of the testator at the time of making his Will, it was held to be no misdirection to tell the jury that they

(*s*) *Doe v. Palmer*, 16 Q. B. 747, at p. 757. See *Accord*. In the goods of Ripley, 1 Sw. & Tr. 68. In the goods of Hardy, 30 L. J., P. M. & A. 142. *Staines v. Stewart*, 2 Sw. & Tr. 320. The verbal and written declarations or statements made by a testator in and about the making of his Will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the Will. *Johnson v. Lyford*, L. R. 1 P. & D. 546. Evidence, however, of the declarations of a testator as to the contents of his Will not forthcoming, whether made before or after its execution, are admissible to prove its contents: *Sugden v. Lord St. Leonards*, 1 P. D. 184, overruling *Quick v. Quick*, 3 Sw. & Tr. 442. *Mellish*, L. J., *dissentiente*. See also *Johnson v. Lyford*, *ubi sup.*, and *Woodward v. Gouldstone*, 11 App. Cas. 469, in which case doubt was expressed whether post-testa-

mentary declarations of a testator as to the contents of a lost will are admissible.

(*ss*) *Per* Sir C. Cresswell, in *In the goods of Hardy*, 30 L. J., P. M. & A. 143.

(*t*) See *Hale v. Tokelove*, 2 Robert, 328, by Dr. Lushington. Where evidence was produced of declarations of a testator showing an intention to adhere to a will in order to rebut the presumption of revocation, arising from its being not forthcoming after his death, Sir J. Hannen held that evidence of declarations of an intention not to adhere to the Will, produced by the opponents to the Will, was admissible to contradict the evidence of adherence, and that therefore a declaration by the testator that he had burnt his Will was admissible, not as evidence of the fact of destruction but as evidence of intention. *Keen v. Keen*, L. R. 3 P. & D. 106.

might take into consideration statements made by the testator as to the dispositions contained in his Will, and which, in fact, corresponded therewith, as throwing back light on the period at which the Will was executed (a year before), and as affording means of inferring what was the state of his competency at that period (*u*).

SECTION VI.

Of the Probate of Wills of Foreigners, &c., and of British Subjects domiciled out of the Jurisdiction of the Court.

If the deceased left no personality in this country, his Will need not be proved here:

If the testator died without leaving any personal property in this country, generally speaking, his Will need not be proved in any Court of Probate here : and, therefore, where the plaintiff, as administrator of I. S., who died at Naples, brought his bill to have a discovery of the intestate's personal effects, the defendant pleaded that the deceased had by his Will made him, the defendant, his executor, and he had proved the Will according to the law of the country ; and he denied that the deceased had left any estate but what was at Naples : and this plea was held good (x).

unless his executor institute a suit:

But if a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, he must prove the Will here also, or a personal representative must be constituted by the Court of Probate here to administer *ad litem* (y). So an executor having obtained probate in Ireland could not bring an action here as executor, even to recover Irish assets, without having obtained probate in England also (z). For the Courts here will not recognize

(u) *Sutton v. Sadler*, 3 C. B., N.S. 99. See also *Whiteley v. King*, 17 C. B. N. S. 756.

(x) *Jauncey v. Sealey*, 1 Vern.
397. *Post*, Pt. I. Bk. v. Ch. II.
§ I.

(y) *Attorney-General v. Cockrell*, 1 Price, 179, by Richards, B. Mitf. Fl. 177, 4th edition. *Tyler v. Bell*, 2 M. & Cr. 89. *Attorney-General v. Bouwens*, 4

M. & W. 193.

(2) *Carter v. Crofts*, Godb. 33. *Whyte v. Rose*, 3 Q. B. 508, per Tindal, C. J. But now sealing an Irish probate or a Scotch confirmation gives them a like force and effect as if a Probate had been granted; See 20 & 21 Vict. c. 73, § 95. 21 & 22 Vict. c. 95, § 29, and Rule 73, P. R. 1862 (Non-Contentious), as to Irish probates: and

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any Will of personalty except such as the Court of Probate of this country has by the probate adjudged to be the last Will (a). Therefore, if a testator die in India, and his personal estate be wholly there, and his executor be resident there, and the Will be proved there, yet if a part of the assets remain in the hands of the executor unappropriated, and come to be administered in England, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, administration to the testator ought to be taken out in this country, and the administrator made a party to the suit (b). So to a bill which seeks an account of the assets of an intestate, who died in India, possessed by a personal representative there, a personal representative of the intestate, constituted in England, is a necessary party, though it does not appear that the intestate, at the time of his death, had any assets in England (c). And it may be stated, as a fully established rule, that in order to sue in any Court of this country, whether of law or equity, in respect of the personal rights or property of a deceased person, the plaintiff must, except in the case of Irish probates and Scotch confirmations resealed, appear to have obtained probate or letters of administration in the Court of Probate of this country (d).

21 & 22 Vict. c. 56, §§ 9, 12 & 14, note to the American edition of the present Treatise, (which Mr. Francis I. Troubat has done the author the honour of publishing at Philadelphia), that it has been established as a rule, by repeated decisions in many of the States, that the executor or administrator of a person who dies domiciled in Great Britain, or any other foreign country, cannot maintain an action in the United States, by virtue of letters testamentary or administration granted to him in the country where the deceased died: But that on the ground of them, an ancillary probate authority or administration will be granted: And further,

(a) Price v. Dewhurst, 4 M. & Cr. 80, 81. Bond v. Graham, 1 Hare, 484. Lasseur v. Tyrconnel, 10 Beav. 28.

(b) Logan v. Fairlie, 2 Sim. & Stu. 284. 1 Myln. & Cr. 59. See also Lowe v. Fairlie, 2 Madd. 101.

(c) Tyler v. Bell, 2 Myln. & Cr. 89. Bond v. Graham, 1 Hare, 482. See *post*, Pt. v. Bk. II. Ch. II.

(d) Whyte v. Rose, 3 Q. B. 507. See also M'Mahon v. Rawlings, 16 Sim. 429. Enohin v. Wylie, 10 H. of L. 19, *per* Lord Cranworth. It appears from an able

note to the American edition of the present Treatise, (which Mr. Francis I. Troubat has done the author the honour of publishing at Philadelphia), that it has been established as a rule, by repeated decisions in many of the States, that the executor or administrator of a person who dies domiciled in Great Britain, or any other foreign country, cannot maintain an action in the United States, by virtue of letters testamentary or administration granted to him in the country where the deceased died: But that on the ground of them, an ancillary probate authority or administration will be granted: And further,

but a Will made abroad of property in this country must be proved here :

Stat. 21 & 22 Vict. c. 56, s. 12. Scotch confirmation produced in Probate Court of England, and sealed there, to have the effect of probate or administration.

Likewise, if a Will be made in a foreign country, and proved there, disposing of personal property in this country, the executor must prove the Will here also (e). And generally speaking, the Court of Probate in this country will adopt the decision of the Court of Probate in the foreign country in which the testator died domiciled (f).

And now by stat. 21 & 22 Vict. c. 56, s. 12, "When any confirmation (which is the Scotch term for Probate) of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland which includes besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate, in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administra-

that the rule just mentioned does not apply, except where the party sues in right of the deceased: If he sues in his own right, although that right be derived under a foreign Will, no administration need be taken out in the United States. See also Story's Conf. of L. Ch. viii, ss. 513, 516, 517, and the note of Mr. Asa Fish to the 5th American edition of this work. And see *Accord. Vanquelin v. Bouard*, 15 C. B., N. S. 341.

(e) *Lee v. Moore*, Palm. 163. *Tourton v. Flower*, 3 P. Wms. 369. *Vanthienen v. Vanthienen*, Fitzgib. 204.

(f) See *post*, p. 302. See *Raymond v. De Wattsville*, 2 Cas. temp. Lee, 358, as to the proper authentication of a copy of a Will proved and deposited in a Court of a foreign State. Before granting probate of a foreign Will

the Court should be satisfied of one of two things, viz., either that the Will is valid by the law of the country where the testator was domiciled, or that a Court of the foreign country has acted upon it and given it efficiency. In the goods of Deshais, 34 L. J. P. & M. 58. R. domiciled in Mexico made a Will according to the law of Mexico. The proper Court there decreed probate of a Spanish translation and not of the original. It was held that the grant in this country must be made upon the production of an English translation of the Spanish copy and not of a certified copy of the original: In the goods of Rule, 4 P. D. 76. See also in the goods of Clarke, 36 L. J. P. & M. 72. In a case where the Will of a British subject domiciled abroad at the time of his death had been

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tion, as the case may be (g), had been granted by the said Court of Probate" (h).

And as to Irish probates it is provided by 20 & 21 Vict. c. 79, s. 95, "From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the

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proved in the French Courts and deposited with a notary who by the law of France was forbidden to allow it to be removed from his custody; it was held that probate might be granted of a copy of the original Will properly proved, limited to such time as might elapse before the original itself should be brought in. In the goods of Lemme [1892], P. 89.

(g) Where confirmation of the executor of a person who has died domiciled in Scotland has been sealed with the Seal of the Court of Probate, in manner provided by this section, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in England, although they are specifically bequeathed, and although, by the law of Scotland, an executor cannot deal with leasehold property in that country: Hood v. Barrington, L. R. 6 Eq. 218. W. E. died possessed of property of small value in this country and entitled under the Will of his uncle to large assets in Scotland which were being duly administered there. The executors of W. E. proved his Will in Scotland only. A legatee under W. E.'s Will applied for a grant of administration of the estate of W. E. in this country, which

application was opposed by the executors. It was held (1) that the Court is not bound to make such a grant but that its power is discretionary; and (2), that, it not having been shown that the executors were not doing their duty, there was no necessity for any grant in this country: In the goods of Ewing, 6 P. D. 19; see also the cases therein cited.

(h) Further provisions as to resealing confirmations and additional confirmations or eiks are contained in 39 & 40 Vict. c. 70, ss. 41—45. These sections meet the difficulties raised in such cases as In the goods of Ryde, L. R. 2 P. & D. 86. The object of the section cited in the text is to render unnecessary a second application for probate, but the Scotch confirmation is not conclusive evidence of the domicile, if that question has been raised in the English Court: Hawarden v. Dunlop, 2 Sw. & Tr. 340. Where the proper duty has been paid in Scotland, no further duty is payable on resealing: Booth's Trusts, 1 Giff. 46. By 22 Vict. c. 30, s. 1, payments made in reliance on any instrument sealed under this Act are protected, notwithstanding any defect affecting the validity of the confirmation.

seal of the last-mentioned Court, and being duly stamped shall be of the like force and effect, and have the same operation in England as if it had been originally granted by the Court of Probate in England" (i).

The rights of the representative constituted here of a person domiciled here extend to personal property abroad :

but the grant of probate here does not extend to it :

All personal property follows the person, and the rights of a person constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property, wherever locally situate (k).

It must not be understood, however, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here can extend to them. For the probate was never granted except for goods which at the time of the death were within the jurisdiction of the Ordinary who made the grant (l) : Though if it should become necessary

(i) See *Divenny v. Corcoran*, 32 L. J. P. & M. 26.

(k) *Spratt v. Harris*, 4 Hagg. 405.

(l) *Attorney-General v. Dimond* 1 Cr. & J. 356. A Will disposing only of property in a foreign country is not entitled to probate in this country : In the goods of Coode, L. R. 1 P. & D. 449. In the goods of Tucker, 34 L. J. P. & M. 29. In the case of In the goods of Winter, 30 L. J. P. & M. 56, probate was granted by Sir Cresswell Cresswell of a Will purporting to deal only with property out of the jurisdiction. The authority of this decision may, however, be doubted. See *post*, p. 544. At all events Sir James Hannen in In the goods of Howden, 43 L. J. P. & M. 27, approved the decision in In the goods of Coode and pointed out that in the cases of In the goods of Harris, L. R. 2 P. & D. 83 (Lord Penzance), and In the goods of De la Saussaye, L. R. 3 P. & D. 42 (Sir James Hannen), where

probate was granted of a foreign Will purporting to deal only with property out of the jurisdiction together with an English Will dealing with property in England, the English Will by reference incorporated the foreign Will. In the case of In the goods of Bolton, 12 P. D. 202, probate was granted of a Belgian Will purporting to deal only with property in Belgium together with an English Will dealing only with property in England, although there do not seem to have been any words of reference or incorporation. The grant to the executor appointed by the English Will was made however by the consent of the Belgian executor who had renounced. As to when it is unnecessary to treat the foreign Will as incorporated, see In the goods of Astor, 1 P. D. 150. In the goods of Smart, 9 P. D. 64. Again, a testator died in England possessed of property in England and South Africa. He executed

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that the courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such courts, by the comity of nations, would probably follow the decision of the Court of Probate in this country, as being the country of domicile (*m*).

Again, if a Will be made here and proved in the Court of Probate here, the probate will not extend to property in the colonies (*n*); though, if the testator was domiciled in this

nor to Will made here of property in the colonies, &c.

two Wills, one disposing of his English estate and the other of his South African estate: each purporting to be independent of the other and intended to have no operation on the property disposed of by the other. It was held that probate might be granted of the English Will without requiring the South African Will to be brought in, on an affidavit being filed exhibiting an attested copy of it and a statement being inserted in the probate that such affidavit had been filed. In the goods of Callaway, 15 P. D. 147. See also In the goods of De la Rue, 15 P. D. 185, where the same principle was applied to a case in which a testator had executed separate Wills relating respectively to his English and Swiss property. See also In the goods of Seaman [1891], P. 253. In the goods of Fraser, *ib.*, 285. So where the deceased left a Will expressly limited to her property abroad, which was proved by her executors in the foreign Court, but she died intestate as to her property in this country, it was held that administration of her property in this country might be granted to her sole next of kin. In the goods of Mann [1891], P. 203.

(*m*) See Story's Conf. of L. Ch. xlii. ss. 512, 513, 518. The

Courts of the country where the deceased was domiciled will administer the property wherever situate; but if, in the course of the administration, it becomes necessary to take legal proceedings to reduce the estate into possession, the representative constituted by the Court of the domicile will have to clothe himself with a title from the Court where the property is locally situate: by the comity of nations, however, the foreign Court will, as a matter of course, grant probate ancillary to that granted by the Courts of the domicile. In all matters, except that of procedure, the foreign Courts have no jurisdiction, unless the representatives themselves accept the jurisdiction of such foreign Court, to determine questions of construction or administration, and then the foreign Court will apply the *lex domicilii*. *Enohin v. Wylie*, 10 H. L. Cases, p. 1. In the goods of Cosnahan, L. R. 1 P. & D. 183. In the goods of Hill, L. R. 2 P. & D. 89. In the goods of Weaver, 36 L. J. P. & M. 41.

(*n*) *Burn v. Cole*, Amb. 416. *Atkins v. Smith*, 2 Atk. 63. So a defendant who had been arrested in Ireland, by writ of *ne exeat regno* issued out of Chancery there

An executor may sue here in respect of foreign assets without a foreign probate.

The law of the place of domicile regulates the decision as to the validity of the Will :

with respect to the validity of the Will of a foreigner domiciled

country, the Judge of Probate in the Plantations is bound by the probate here, and ought to grant it to the same person (o).

But though the executor of a man who has died domiciled in England be not able to sue in a foreign Court by virtue of an English probate (any more than he can sue in an English Court by virtue of a foreign probate), yet for the purpose of suing in an English Court, a probate obtained in the proper Court here extends to all the personal property of the deceased wherever situate at the time of his death, whether in Great Britain or the colonies, or in any country abroad (p). So an executor having clothed himself with an English probate, might, without having obtained probate in Ireland also, sue in the Courts here to recover a debt which was *bona notabilia* in Ireland (q).

It is now a clearly established rule, that the law of the country, in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession as to personalty (r), but also subject in the case of British subjects to the exceptions hereafter mentioned, regulates the decision as to what constitutes the last Will, without regard to the place either of birth or death, or the situation of the property at that time.

Accordingly, if the deceased was a foreigner, domiciled abroad, and his Will be brought into the Court of Probate

for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country : *Swift v. Swift*, 1 Ball & Beat. 326. See stat. 23 Vict. c. 5, s. 1, by which probate here is to extend to India Government notes, &c.

(o) By Lord Mansfield, *Ambl.* 416.

(p) *Whyte v. Rose*, 3 Q. B. 493, 507.

(q) *Whyte v. Rose*, 3 Q. B. 493. It would, however, be a good defence to such an action that the debt had been paid to a personal

representative of the deceased duly constituted in Ireland : *ibid.* 510.

(r) *Craigie v. Lewin*, 3 Curt. 435. *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468, 486. *Bremer v. Freeman*, 10 Moo. P. C. 306. *Enohin v. Wylie*, 10 H. of L. 1. *Crispin v. Dogliani*, 3 Sw. & Tr. 96, 99. *Whicker v. Hume*, 7 H. of L. 124. *Miller v. James*, L. R. 3 P. & D. 4. See, however, as to Wills made by British subjects dying after August 6, 1861, stat. 24 & 25 Vict. c. 114, s. 3, *post*, p. 309, and see stat. 24 & 25 Vict. c. 121.

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here for the purpose of being admitted to probate, the Court, in deciding whether the instrument be a valid Will or not, will be guided not by our own law, but by the law of the country where the deceased was domiciled (s). Thus in a case, where the testatrix was a married woman, a native of Spain, domiciled there, and it appeared upon affidavits, that by the law of Spain she had power to bequeath, as a *feme sole*, the property which she brought her husband on her marriage, probate was granted of the Will, made according to the law of that country (t).

And it was established by the determination of the Delegates in *Stanley v. Bernes* (u), that the same rule, viz., that the question of the validity of a Will of a testator domiciled abroad ought to be determined in our Courts of Probate according to the law of the country where the testator died domiciled, extends to the case of a British subject domiciled in a foreign state, notwithstanding the Will disposes of property in England (x). In that case the Delegates, reversing a sentence of the Prerogative Court, refused probate to two codicils, disposing solely of money in the British Funds and made by a British born subject, domiciled in the Portuguese dominions, on the ground that the instruments were not executed according to the law of Portugal.

And it should seem that if a British subject, domiciled in a foreign country, by his Will appoints an executor, but makes a disposition of his property, which, though valid by the law of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted to the executor in this country, to hold that the Will has no operation beyond the appointing of the executor (y); and, consequently, that he is a trustee

ciled abroad, the Court will be guided by the law of the place of domicile:

the same with respect to the Wills of British subjects domiciled in foreign states, who died before Aug. 6, 1861:

Will by British subject domiciled abroad valid by English law but invalid by law of country of domicile:

(s) *Curling v. Thornton*, 2 Add. 21. The French lawyers, it should seem, acknowledge the same principle: see *Collectanea Juridica*, vol. 1, pp. 333, 331. 2 Add. 22.
(t) In the goods of Maraver, 1 Hagg. 499.

(u) 3 Hagg. 374.

(x) But see now stat. 24 & 25 Vict. c. 114, *post*, p. 308.

(y) *Thornton v. Curling*, 8 Sim. 310. See also *Campbell v. Beaufoy*, Johns. 320. On the same principle it would seem that a Will of

for the next of kin, and must distribute the property exactly as if the deceased had died intestate.

meaning of the term "the law of the country of domicile:"

When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law, but, in some instances, of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural born subject of that country. Thus in *Collier v. Rivaz* (z), the testator, an English born subject, died domiciled in Belgium, leaving a Will not executed according to the forms required by the Belgian law: But by that law, the succession in such a case is not to be governed by the law of the country applicable to its natural born subjects, but by the law of the testator's own country: and it was held that the Will, being valid according to the law of England, ought to be admitted to probate (a). So in *Maltass v. Maltass* (b), it appeared that by the law of Turkey no subject of that country can make a Will: By treaty between Great Britain and the Ottoman empire an English domiciled subject may make a Will (c): The deceased, John Maltass, was born at Smyrna of English parents, his father having been long settled as a merchant there; The deceased was himself a member of a commercial firm at Smyrna and died there, having been constantly resident there, except that he passed his boyhood in England for the purposes of education: And it was held by Dr Lushington (sitting for Sir H. Jenner Fust) that a Will made by the deceased in

a British subject which must be held by an English Court to be duly executed by reason of 24 & 25 Vict. c. 114 (*post*, 308), though not in the form required by the law of the place of the testator's domicile, may still be invalid, either because the testator is according to the law of his domicile incapable of making a Will, or because the Will is materially invalid or inoperative as containing provisions contra-

vening the law of the testator's domicile. Dicey on the Law of Domicil, p. 306.

(z) 2 Curt. 855.

(a) See the observations made on this case by Lord Wensleydale in *Bremer v. Freeman*, 10 Moo. P. C. 374. See also the observations of Sir J. Hannen in *Bloxam v. Favre*, 8 P. D. 103.

(b) 1 Robert. 67.

(c) See 3 Curt. 231.

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1834, and which was good according to the law of England as it then stood, was entitled to probate: For if the testator was to be regarded as domiciled, in the legal sense, in Turkey, and if the law of domicile did prevail, the law of Turkey, in conformity with the Treaty, says, that in such case the succession to the personal estate shall be governed by the British law; if he was not domiciled in Turkey, but in England, then the law of England prevailed, *propria rigore*.—But in either point of view, the Will, in order to be valid, must have been made according to the testamentary law of England: And accordingly, Sir H. Jenner Fust refused to admit to probate a Will of the same party deceased, which had been made after the year 1837, and had not conformed to the Wills Act (*d*).

Again, if the testator was a British subject, and at the time of his death domiciled in some other part of the British dominions, out of England, the Court, upon application for probate, has felt itself bound to defer to the law of the place where the deceased was domiciled (*e*).

Upon this ground it has been the practice, upon production of an exemplified copy of the probate granted by the proper Court in the country where the deceased died domiciled, for the Prerogative Court here to follow the grant upon the application of the executor, in decreeing its own probate (*f*).

When the Court is satisfied that the testator died

the rule is the same with respect to the Wills of British subjects domiciled in the British dominions out of England, who died before Aug. 6, 1861: practice of the Court here to follow the grant of the Court of domicile: Court will grant ancillary

(*d*) *Maltass v. Maltass*, 3 Curt. 231. There is no such thing as domicile arising from society and not from connection with a locality. Therefore where the testator, a member of the Chaldean Catholic community having a Turkish domicile of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject, it was held that as Cairo was not a British possession governed by English law, the testator's permanent abode therein under British protection did not

attach to him an English or Anglo-Egyptian domicile. *Abdul Messih v. Farra*, 13 A. C. 431, approving *R. Tootal's Trusts*, 23 C. D. 532.

(*e*) But see now stat. 24 & 25 Vict. c. 114, s. 2, *post*, 308.

(*f*) *Ante*, p. 298. The doubt on this point expressed by Sir J. Nicholl in *Larpent v. Sindry*, 1 Hagg. 382, and in the goods of *Read*, 1 Hagg. 474, is now removed. See *Enohin v. Wylie*, 10 H. L. Cas. 14. Sir J. P. Wilde in the case of *In the goods of Earl*, L. R. 1 P. & D. 450, after re-

letters of probate in cases of Will of testator domiciled abroad :

domiciled in a foreign country, and that his Will, containing a general appointment of executors, has been duly authenticated by those executors in the proper court in the foreign country, it is the duty of the Court in this country to clothe the foreign executors with ancillary letters of probate to enable them to get possession of that part of the personal estate which was locally situate in England (g). In *Laneuville v. Anderson* (h), it was held that where in the case of a domiciled Frenchman, the French Court had decreed that the time limited by the French law for the execution of the executorship thereby created had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially interested were the only persons who had a right to interfere, the Court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor. So, in *Crispin v. Doglioni* (i), Sir C. Cresswell held, that

viewing the cases of *Larpent v. Sindry*, In the goods of Read, In the goods of the Countess Da Cunha, 1 Hagg. 237; In the goods of H.R.H. the Duchess of Orleans, 1 Sw. & Tr. 253; *Viesca v. D'Aramburu*, 2 Curt. 277; In the goods of Stewart, 1 Curt. 904; In the goods of Rogerson, 2 Curt. 656; and citing the observations of Lord Westbury in *Enohin v. Wylie*, *ubi sup.*, says: "I think that the Court, acting on the special powers contained in the 73rd section of the 20 & 21 Vict. c. 77, ought" in all cases of Wills of persons having a foreign domicile, "to make a grant to the person who has been clothed by the Court of the country of domicile with the power and duty of administering the estate, no matter who he is, or on what ground he has been clothed with that power." As to the practice of

the Court to grant probate of a copy of the original Will when it is impossible to obtain such original Will, see In the goods of Lemme, [1892], P. 89, *ante*, p. 298, note (f). The grant will not necessarily be a grant of probate, if the person to whom the foreign Court has made the grant is a person not entitled to the grant as executor by the law of England; in such a case the grant will be of administration with the Will annexed. In the goods of Earl, L. R. 1 P. & D. 450; In the goods of Cosnahan, L. R. 1 P. & D. 183; In the goods of Weaver, 36 L. J. P. & M. 41; In the goods of Hill, L. R. 2 P. & D. 89; In the goods of Dost Aly Khan, 6 P. D. 6.

(g) *Enohin v. Wylie*, 10 H. of L. 14, by Lord Westbury.

(h) 2 Sw. & Tr. 24.

(i) 3 Sw. & Tr. 96.

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(k) *Enohin* of L. 19, by appears to have Lord Westbury the domicile to which leg of a testator, to distribution required to *Enohin v. Doglioni* by Sir C. Cresswell the point is already decided Domicil, it the Court of an administrator must

the judgment of the Court of Domicil of the deceased is binding on the Court of a foreign country, in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign Court which have been decided by the Court of Domicil.

When the deceased has left a Will, valid by the law of his domicil, and probate, either original or ancillary, has been obtained here, the duty of the Court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who by the law of domicil are entitled under the Will, and that being ascertained to distribute the property accordingly. The duty of administration has to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil (*k*).

duty of Court in administering property where deceased left Will valid by law of domicil and probate has been obtained in England.

The rule above laid down (*l*) applies, lastly, to the case of the instance of a person not a native of this country, but domiciled here at the time of his death: in this case, the law of England is to regulate the decision as to the validity of a Will of personal estate, or what are the rights under it (*m*).

Will of a person not a native, but domiciled here.

The rules of law for ascertaining the domicil are considered in a subsequent part of this Work, conjointly with the

Rules for ascertaining domicil.

(*k*) *Enoch v. Wylie*, 10 H. of L. 19, by Lord Cranworth. It appears to have been laid down by Lord Westbury that the Court of the domicil is the *forum concursus* to which legatees under the Will of a testator, or the parties entitled to distribution of the estate, are required to resort. (See also *Crispin v. Dogliani*, 3 Sw. & Tr. 90, by Sir C. Cresswell.) But unless the point in dispute has been already decided by the Court of Domicil, it is apprehended that the Court of this country in which an administration suit is instituted must decide for itself what,

according to the law of the domicil, is the true construction of the Will, and what are the rights of the parties claiming to be interested in the estate in cases as well of intestacy as of testacy. As to raising the question of domicil, see *Duprez v. Veret*, L. R. 1 P. & D. 583.

(*l*) *Ante*, p. 302.

(*m*) *Price v. Dewhurst*, 8 Sim. 279. S. C. 4 Mylne & Cr. 76, 82. *Yates v. Thompson*, 3 Cl. & Fin. 544. See *post*, Pt. III. Bk. III. Ch. II. § I. as to the construction of the Will of a testator domiciled abroad.

Will made under a power conformably to the terms of the power, but not conformably to the law of the place of domicile.

As to Wills made by British subjects dying after Aug. 6, 1861. Stat. 24 & 25 Vict. c. 114. Wills made by

rules of law as to the distribution of the effects of deceased persons, who have died domiciled in a foreign country (n).

It must be here observed, that where a Will is made disposing of personal property situate in this country, under a power of appointment, and it is duly executed in compliance with the requisites of the power, it has been held that such a Will ought to be admitted to probate in this country, notwithstanding it be not properly executed according to the forms prescribed by the testamentary law of the country in which the testator was domiciled at the time of his death (o).

But a power to appoint "by a Will duly executed," is well exercised by a Will good according to the law of the country of the testator's domicile, though ill executed according to the law of England (p). The above rules as to the validity of Wills in point of form were rendered to a great extent inapplicable to Wills made by British subjects dying after 6th August, 1861, by the statute 24 & 25 Vict. c. 114.

By the first section of that Act, "every Will and other testamentary instrument (q) made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his

(n) *Post*, Pt. III. Bk. IV. Ch. I. § v.

(o) *Tatnall v. Hankey*, 2 Moo. P. C. 342. The opinion to the contrary expressed by Sir C. Cresswell in *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 454, was declared by that judge to be incorrect: see *In the goods of Alexander*, 29 L. J. P. M. & A. 93. But Lord Penzance, although he followed *In the goods of Alexander* in the case of *In the goods of Hallyburton*, L. R. 1 P. & D. 90, expressed a strong opinion that *Crookenden v. Fuller* expressed a truer view of the law and was more in accordance with the judgment of the Privy Council in *Barnes v. Vincent*, 5 Moo. P. C.

201, which was subsequent to *Tatnall v. Hankey* (*ubi sup.*), and, as he thought, inconsistent with the note to that case, the authority of which note he questioned.

(p) *D'Huart v. Harkness*, 34 L. J. Ch. 311. In the case, however, of a Will which is only valid by reason of 24 & 25 Vict. c. 114, ss. 9 and 10, of the Wills Act must be complied with: *Re Kirwan's Trust*, 25 C. D. 373.

(q) In determining the question what papers are testamentary under the provisions of this statute the Court will have regard to the law of one country only and will not mix up the legal precepts of different countries: *Pechell v. Hilderley*, L. R. 1 P. & D. 670.

or her death well executed and Ireland the same by the law of the place where it was made, Majesty's

Sect. 2. made with (whatever of making shall, as 1 and shall and in S according being in the same is made

Sect. 3. be held to be constructed as to change of

(r) As to section to France by man, see *In* 2 P. D. 94. a foreigner ing to the the English withstanding this statute tion Act, 1 be disposed same manner a natural the goods 111. Blox 101. 9 P. does not the provis

or her death), shall as regards personal estate, be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (r).

Sect. 2.—“Every Will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death), shall, as regards personal estate, be held to be well executed, and shall be admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made” (s).

Sect. 3.—“No Will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same” (t).

British subjects out of the kingdom to be admitted if made according to the law of the place where made, or where testator was domiciled or had his domicile of origin.

S. 2. Wills made by British subjects in this kingdom to be admitted if made according to local law.

S. 3. Change of domicile not to invalidate Will.

(r) As to the application of this section to a Will executed in France by a naturalised Englishman, see *In the goods of Lacroix*, 2 P. D. 94. A Will, however, of a foreigner executed abroad according to the formalities required by the English law is invalid, notwithstanding the provisions of this statute, and of the Naturalisation Act, 1870, that property may be disposed of by an alien in the same manner in all respects as by a natural born British subject; In the goods of *Von Buseck*, 6 P. D. 211. *Bloxam v. Favre*, 8 P. D. 101. 9 P. D. 130. This statute does not touch or interfere with the provisions of sections 8 and

10 of the Wills Act, that no appointment made by Will in the exercise of a power shall be valid unless the same be executed in the manner therein provided, *i.e.*, in the presence of, and attested by, two witnesses: *Re Kirwan's Trust*, 25 Ch. D. 373.

(s) A naturalised British subject whilst domiciled in England, made a Will according to the forms required by the law of England. At the time of his death he was domiciled in Italy. His Will was admitted to probate under this section: In the goods of *Gally*, 1 P. D. 438.

(t) A domiciled Scotchman made a Will and afterwards married in

S. 4. Nothing in the Act to invalidate Wills otherwise made.

Sect. 4.—“Nothing in this Act contained shall invalidate any Will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such Will or other testamentary instrument may be revoked or altered by any subsequent Will or testamentary instrument made valid by this Act.”

S. 5. Extent of Act.

Sect. 5.—“This Act shall only extend to Wills and other testamentary instruments made by persons who die after the passing of this Act” (Aug. 6, 1861).

SECTION VII.

Practice of the Court in certain other particulars as to granting Probate.

Costs in the Probate Division :

Costs in the Probate Division are now governed, as in the other Divisions of the High Court, by the Judicature Acts and the Rules of the Supreme Court made thereunder, but, inasmuch as by those Acts and Rules for the most part, except in cases where an action or issue is tried by jury, costs are in the discretion of the Court, the result is that the rules as to costs, which formerly obtained in the Court of Probate, are still observed in the Probate Division, and that portion of this Treatise which deals with such rules is therefore preserved, subject to such modifications as may have been introduced by recent decisions.

now governed by R. S. C., 1883, Ord. LXV., r. 1.

By the Rules of the Supreme Court of Judicature by which the question of costs in the Probate Division of the High Court of Justice is now governed, it is enacted [Ord. LXV. r. 1], that “Subject to provisions of the Acts and these rules the costs of, and incident to, all proceedings in the High Court shall be in the discretion of the Court or Judge: but

Scotland. He subsequently acquired an English domicile, which he retained till his death. It was held that as the Will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicile, and was entitled to probate in England: In the goods of Reid, L. R. 1 P. & D. 74.

nothing but a trustee, or institutor, right to be in the Court issue is to the judge tried, or

The question under the Prerogative

It was a technical Court deceased his costs litigant decreeing contest or that doubtful

(u) Decree 334. The dictation out of the Dendy, Davies v. 90. Excess of the power where the sufficient 4 P. D. 8

(z) Bagge Hagg, 23 1 Sw. & well said Ecclesiastical was a failure of kin to prove and given

nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted, or carried on, or resisted any proceeding, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division, provided that where any action or issue is tried by a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

The question of costs was in the discretion of the Judge under the practice both of the Court of Probate and of the Prerogative Court, its predecessor.

It was only under special circumstances that the Ecclesiastical Court directed costs to be paid out of the estate of the deceased (*u*). It did not follow that a party was entitled to his costs out of the estate, because there was "*justa causa litigandi*" (*x*): but the principle which guided the Court in decreeing such costs was, that the party was led into the contest by the state in which the deceased left his papers (*y*), or that the validity of the Will has been contested on a doubtful point of law (*z*).

In what case costs decreed out of the estate of the deceased.

(*u*) Dean *v. Russel*, 3 Phillim. 334. The Court has still no jurisdiction to order costs to be paid out of the real estate. *Young v. Dendy*, L. R. 1 P. & D. 344. *Davies v. Reynolds*, L. R. 3 P. & D. 90. Except, it seems, by consent of the parties interested, in cases where the personal estate is insufficient: *Smith v. Hopkinson*, 4 P. D. 84.

(*x*) *Barwick v. Mullings*, 2 Hagg. 234. In *Nicholls v. Binns*, 1 Sw. & Tr. 239, 241, Sir C. Cresswell said that by the practice of the Ecclesiastical Courts, where there was a fair case for inquiry, the next of kin might call on the executors to prove the Will in solemn form, and generally speaking, at the ex-

pense of the estate. But the same judge refused to allow the next of kin their costs out of the estate, when they had chosen to raise a question of domicile, which was likely to put the executors to great expense: *Onslow v. Cannon*, 2 Sw. & Tr. 136. See also *Seaton v. Sturch*, 29 L. J., P. & M. 195.

(*y*) *Hillam v. Walker*, 1 Hagg. 75.

(*z*) *Robins v. Dolphin*, 1 Sw. & Tr. 518. And the general proposition, that where a party entitled in distribution simply calls for proof of a Will, and merely cross-examines the witnesses, without any misconduct in the suit, he is entitled to have his costs out of the estate, is fully supported by

Two rules were laid down by Sir J. P. Wilde for the guidance of the Court of Probate (xx):—First, if the cause of litigation takes its origin in the fault of the testator (a), or those interested in the residue (b), the costs may be properly paid out of the estate; secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the Will or the capacity of the testator (c), or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent (d).

Cases in which executor propounding a Will will be condemned in costs.

Although, generally speaking, an executor propounding a Will will be entitled to his costs, yet sometimes he will be condemned in costs, as where without explanation he consented to a verdict against him on the morning of the trial (e), or knowing that the Will had not been well exe-

the authorities: *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232. But it is otherwise where the proceedings were not taken simply for the purpose of getting the opinion of the Court on the Will, but were ancillary to another suit pending in respect of the real estate: *Swinfen v. Swinfen*, 1 Sw. & Tr. 283. For instances where the unsuccessful party has not been condemned in costs, see *Ferrey v. King*, 3 Sw. & Tr. 51. *Bramley v. Bramley*, *ibid.* 430. *Tippett v. Tippett*, L. R. 1 P. & D. 54. See further as to costs, *Cleare v. Cleare*, 1 L. R. P. & D. 655.

(xx) *Mitchell v. Gard*, 3 Sw. & Tr. 275.

(a) See *Accord.*: *Boughton v. Knight*, L. R. 3 P. & D. 64. *Charter v. Charter*, L. R. 7 H. L. 364. *Jenner v. Finch*, 5 P. D. 106.

(b) *Williams v. Henery*, 3 Sw. & Tr. 471.

(c) *F v. Peacock*, 1 Rob. 453.

Waring v. Waring, 5 Not. of Cas. 324.

(d) See *Accord.* *Davies v. Gregory*, L. R. 3 P. & D. 28. *Orton v. Smith*, *Ibid.* 23. See further *Nash v. Yelloly*, 3 Sw. & Tr. 59, where a plaintiff who was the executor, was condemned in costs, the Will having been refused probate on the ground of undue influence. But in cases where neither the testator by his own conduct, nor the executors or persons interested under the Will by their conduct, have brought about the litigation as to its validity, but the opponents of the Will, after due enquiry into the facts, entertained a *bond fide* belief in the existence of a state of things which, if it did exist, would justify litigation and the opposition is unsuccessful, each party must pay his own costs: *Davies v. Gregory*, (*ubi supra*).

(e) *Richards v. Humphreys*, 29 L. J., P. & M. 137.

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anted (*f*), or where there is an inofficious instrument propounded by a person materially benefited (*g*).

The mere fact that a person who has improperly propounded a testamentary paper is a nude executor, is no ground for relieving him from his liability to condemnation in costs (*h*).

A legatee, performing the duty of an executor in proving the Will or codicil, is entitled to his costs out of the estate (*i*). But the rule as to a legatee having his costs out of the estate on establishing a codicil, is not so general as in the case of a Will (*k*): And if they are occasioned by his own delay in producing the paper, he must pay his own costs (*l*).

Legatee proving Will entitled to costs out of the estate.

Where an executrix through her negligence lost a Will, and proved a draft of it, she was ordered to pay the costs of the defendants, and was allowed out of the estate such costs only as she would have been entitled to if she had proved the original Will in soleran form (*ll*).

Where a party propounding a Will became a bankrupt, the Court directed him to find security for costs (*m*).

Security for costs.

The rule of the Common Law Courts as to the occasions on which security for costs should be given, was adopted by the Court of Probate, *e.g.*, security for costs was required of a plaintiff to a suit when resident without the jurisdiction of

(*f*) *Clarkson v. Waterhouse*, 29 L. J., P. & M. 136.

(*g*) *Dodge v. Meech*, 1 Hagg. 612.

(*h*) *Rennie v. Massie*, L. R. 1 P. & D. 118.

(*i*) *Williams v. Goude*, 1 Hagg. 610. *Sutton v. Drax*, 2 Phill. 323. And just as an executor who proves a Will is entitled to take the costs, which he has incurred, out of the estate without any order of the Court, so a legatee, performing the duty of an executor, will be entitled to an order that his extra costs shall be paid out of the estate. See *Wilkinson v. Corfield*, 6 P. D. 27. The order will be *nomine expen-*

sarum: *Bremer v. Freeman*, Dea. & Sw. 258. See also *Bewsher v. Williams*, 3 Sw. & Tr. 62. So a next of kin who had successfully opposed a Will propounded by the widow of the deceased as sole executrix named therein, the widow not being condemned in costs, was held to be entitled to costs out of the estate: *Critchell v. Critchell*, 3 Sw. & Tr. 41.

(*k*) *Headington v. Holloway*, 3 Hagg. 280, 283.

(*l*) *Ibid.*

(*ll*) *Burl v. Burl*, L. R. 1 P. & D. 472.

(*m*) *Goldie v. Murray*, 2 Curt. 797.

the Court, but was not required of a defendant in a similar position: *Robson v. Robson*, 3 Sw. & Tr. 568. It should be observed, that on the question as to the immunity of the defendant from giving security for costs, the substantial, and not only the nominal, position of defendant and plaintiff respectively in the suit should be considered, as in certain cases, in the Court of Probate, the nominal position of plaintiff or defendant depends on the mode in which the cause commenced: *Robson v. Robson*, *ubi sup.*

This question of giving security for costs in the Probate Division remains governed by the old Common Law rules. The amount of the security to be given is in the discretion of the Court.

R. S. C. 1883,
Ord. LXV.,
r. 6.

Liability of
married women
to give security
for costs.

Costs in case of
a party
opposing Will
after giving
notice under
R. S. C.,
Ord. XXI.,
r. 18.

Costs of inter-
veners.

Costs of party
calling on exe-
cutor to prove
a Will.

Married women suing as plaintiffs without their husband's being joined are not since the Married Women's Property Act, 1882, liable to give security for costs (*n*).

As to the position of a party opposing a Will, and giving notice under R. S. C. Order XXI., rule 18, with regard to his liability to pay costs under the practice of the Prerogative Court, the Court of Probate, and the Probate Division of the High Court, respectively, see *ante*, p. 281.

There is no definite rule as to the payment of the costs by or to interveners. Each particular case depends on its own circumstances (*o*).

By the practice of the Prerogative Court, as it has been already pointed out (pp. 280, 281), the next of kin, a creditor who had obtained a grant of administration, or an executor under a former Will, had a right to call upon the executor to prove the Will in solemn form, without being liable for costs, provided that they did not do so vexatiously¹⁷. If they

(*n*) *Threlfall v. Wilson*, 8 P. D. 18.

(*o*) For an instance in which the interveners have been allowed costs out of the estate, see *Cross v. Cross*, 3 Sw. & Tr. 300, but see *contra*. *Colvin v. Fraser*, 2 Hagg. 368. *Shaw v. Marshall*, 1 Sw. & Tr. 129. An heir at law who in-

tervenes in a suit, not being cited, and opposes a Will, is entitled to costs, if the Will is pronounced against: *Rayson v. Parton*, L. R. 2 P. & D. 38. And where he is made a party by order of the Court, even though he is ultimately unsuccessful: *Singleton v. Tomlinson*, 3 App. Cases, 404.

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exercised this right vexatiously, or pleaded, or attempted to set up, a case of fraud, which they were not justified by the evidence in doing, they were liable to be ordered to pay costs. This right, however, does not extend to a residuary legatee under a former Will.

If they put an executor on proof after he had taken probate in common form, they did so at the risk of being condemned in costs.

In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit (*p*). What costs are included.

The Court, in a case where a defendant had destroyed the Will the subject of proof, held that it had power to condemn the party who had been cited, but had not appeared, in the costs of the suit (*q*), so too a person who has not been cited, nor made himself a party to the suit, but who has entered a *caveat*, may be condemned in costs (*r*). Liability of party cited but who has not appeared to pay costs.

It is a necessary consequence of some of those rules of the Court of Probate, which there has already been occasion to notice, that a Will may be in part admitted to probate, and in part may be refused. Thus, if the Court shall be satisfied that a particular clause has been inserted in a Will, by fraud, without the knowledge of the testator in his lifetime (*s*), or by forgery after his death (*t*), or, it should seem, if he has been induced by fraud to make it a part of his Will (*u*), probate will be granted of the instrument with the reservation of that clause. Again, where a clause is introduced in a testamentary paper, *per incuriam*, and the deceased executes the paper, not having given any instructions for such clause, and it not having been read over to him, probate will be granted of the remainder of the paper, omitting such clause (*x*). Probate of a Will may be in part granted and in part refused :

(*p*) *Fisher v. Fisher*, 4 P. D. 231.

(*q*) *King v. Gillard*, L. R. 1 P. & D. 539.

(*r*) *Ratcliffe v. Barnes*, 31 L. J., P. & M. 61.

(*s*) *Barton v. Robins*, 3 Phill. 455, note (*b*).

(*t*) *Plume v. Beale*, 1 P. Wms. 388.

(*u*) *Allen v. McPherson*, 1 H. of L. 191.

(*x*) In the goods of Duane, 2 Sw. & Tr. 590. In the goods of Oswald, L. R., 3 P. & D. 162. See *Morrell v. Morrell*, 7 P. D. 68. The requirements of the Court before it will exclude from probate part of a Will, and the *onus probandi* are

but the Court
cannot ex-
punge.

So, since part of a Will may be established, and part held not entitled to probate, if actual incapacity be shown at the time of the execution of the latter part, the Will shall, in such case, be engrossed without it, and so annexed to the probate (y). But the Court cannot, even by consent, order a passage of the Will to be expunged, which the testator, being of sound mind, intended to form part of it (z). But though the Court

much discussed in *Atter v. Atkinson*, L. R. 1 P. & D. 670. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, *Fulton v. Andrew*, L. R. 7 H. L. 448. In the goods of *Bushell*, 13 P. D. 7. In the goods of *Huddleston*, 63 L. T. (N. S.) 255. In the goods of *Boehm* [1891], P. 247. Sir J. Hannen in *Morrell v. Morrell*, *ubi supra*, ordered the word "40" to be struck out of the four places in which it occurred in the Will, and in his judgment said, "In the case of *Harter v. Harter*, L. R. 3 P. & D. 11, I held that the language of a Will could not be changed where the testator had seen the words and adopted them, but in *Fulton v. Andrew*, where a residuary bequest was introduced into the Will without the knowledge of the testator, the clause containing the bequest was rejected. If so, the principle may be applied to a single word, and, therefore, on the ruling of the House of Lords in *Fulton v. Andrew* (L. R. 7 H. L. 448) I hold that the words may be struck out which have been introduced without the authority of the testator." But where the rejection of part alters the sense of the remainder, *quære*, whether there is a valid Will within the meaning of 1 Vict. c. 26, s. 9. *Rhodes v. Rhodes*, 7 A. C. 192.

(y) *Billinghurst v. Vickers*, 1 Phill. 197. *Wood v. Wood*, *ibid.* 357. *Ante*, p. 36.

(z) So where a legatee, at the request of the testator, signed her name to the Will, and the testator subsequently duly executed the Will in the presence of two witnesses, who attested it, a motion to strike out the name of the legatee was rejected: In the goods of *Mitchell*, 2 Curt. 916. In the goods of *Forest*, 2 Sw. & Tr. 334. In the goods of *Raine*, 34 L. J., P. & M. 125. In the goods of *Smith*, 3 Sw. & Tr. 589. In the goods of *Sharman*, 1 L. R. P. & D. 661. Where a Will had been executed in the presence of two witnesses, and in addition to their signatures the signature of a third person, who was also residuary legatee, appeared at the foot of the Will, the Court received evidence to explain why such signature was written, and, being satisfied that it was not written with the intention of attesting the signature of the testator, ordered it to be omitted in the probate. This decision does not seem quite consistent with the earlier cases, and particularly not with *In the goods of Forest*, *ubi supra*, in which case Sir C. Cresswell pointed out that if the signature were omitted in the probate the next of kin would be unable in a Court of Construc-

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cannot expunge any words from the original Will, it has, it seems, allowed offensive passages, such as scurrilous imputations on the character of another man, to be excluded from the probate and copy kept in the Registry (*a*).

In a case where the executor and universal legatee had been, by a mistake of the solicitor who drew the Will, described therein by a wrong name; (*viz.* "my nephew Barton Nicholas Shuttleworth" instead of "Barton Nicholas Bayley") probate was granted to him in his right name, the testator's next of kin consenting (*b*). But the Court cannot, even by consent, alter the Will by substituting one name for another, however cogent the evidence of mistake may be (*c*).

Nor has the Court, under any circumstances, power to make any alteration in papers of which probate has been granted. Therefore, where the Vice-Chancellor of England had ordered, that two promissory notes, which, with certain testamentary indorsements on them, had been admitted to probate, should be paid in a certain way, and that having been done, he further ordered that the notes should be cancelled, Sir H. Jenner Fust refused to direct that this order should be carried into effect (*d*).

It is laid down by Swinburne, that if a testament be made in writing, and afterwards lost by some casualty, if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof,

tion to raise the question as to whether the signature was that of a subscribing witness so that persons signing would forfeit all interest under the Will, whereas if the signature were retained it might still be shown that the signature was not that of a subscribing witness. The case of *In the goods of Sharman (ubi sup.)* seems to have been followed in the case of *In the goods of Smith*, 15 P. D. 2.

(*a*) *Curtis v. Curtis*, 33. The words sought to be expunged in

that case were in the Will of a husband reflecting severely on the conduct of his wife. In the goods of *Wartnaby*, 1 Robert. 423. *Marsh v. Marsh*, 1 Sw. & Tr. 528. In the goods of *Honywood*, L. R., 2 P. & D. 251.

(*b*) In the goods of *Shuttleworth*, 1 Curt. 911.

(*c*) In the goods of *Collins*, 7 Notes of Cas. 278. In the goods of *Boehm* [1891], P. 247.

(*d*) In the goods of *Hughes*, 2 Robert. 341.

Probate granted in his right name to an executor wrongly named in the Will :

but the Will cannot be altered :

nor cancelled in part.

Probate of a lost Will :

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fraud, or be-
come illegible.

these two witnesses, so deposing to the tenor of the Will, are sufficient for the proof thereof in form of law (e). In such cases the Court will grant probate of the Will "as contained in the depositions of the witnesses" (f): And, at this day, it is quite clear that the contents or substance of a testamentary instrument may be thus established, though the instrument itself cannot be produced, upon satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him (g). Thus, where the testator had delivered his Will to A. to keep for him, and four years afterwards died, when the Will was found gnawn to pieces by rats, and in part illegible; on proof of the substance of the Will, by the joining of the pieces, and the memory of witnesses, probate was granted (h). So if a Will, duly

(e) Swinb. Pt. 6, s. 14, pl. 4.

(f) Trevelyan v. Trevelyan, 1 Phillim. 154. Where a Will has been lost and evidence of its contents is supplied by the production of a draft and of the parol testimony of persons who had read the Will the parol evidence must be placed side by side with the draft, and out of them the Court will extract the contents of the Will to be proved: Burls v. Burls, L. R. 1 P. & D. 472.

(g) The contents of a lost Will, like those of any other lost instrument, may be proved by secondary evidence. Declarations written or oral made by a testator both *before* and *after* the execution of his Will are, in the event of its loss, admissible as secondary evidence of its contents: Sugden v. Lord St. Leonards, 1 P. D. 154. Gould v. Lakes, 6 P. D. 1.

In the case of Sugden v. Lord St. Leonards, Mellish, L.J., dissented from the judgment of the other members of the Court as to the admissibility in evidence of

declarations made by the testator *after* the execution of the Will, and this same doubt was afterwards expressed in the House of Lords in the case of Woodward v. Goulstone, 11 App. Cas., in which the case of Sugden v. Lord St. Leonards was considered.

The contents of a lost Will may be proved by the evidence of a single witness though interested, whose veracity and competency are unimpeached: Sugden v. Lord St. Leonards, *vid. sup.*

See also the late case of Harris v. Knight, 15 P. D. 170, where the existence and contents of a lost Will and the handwriting of testator and attesting witnesses who had died sometime after the testator were proved by parol evidence. The circumstances of this case were very peculiar, and Cotton, L.J., dissented from the judgment of the rest of the Court.

(h) Toller, 70. As a general rule, the Court requires the draft or copy of a lost or destroyed Will to be propounded before admitting

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executed, is destroyed in the lifetime of the testator, without his knowledge, it may be pronounced for, upon satisfactory proof being given of its having been so destroyed, and also of its contents (i). And where, after the death of the testator, his Will and codicil were wrongfully torn by his eldest son, the Court, having by means of some pieces which were saved, and by oral evidence, arrived at the substance of the instruments, pronounced for them (k). But when allegations of this sort are made, they must be supported by the clearest and most stringent evidence (l). In accordance with these decisions, it was held by the Court of Queen's Bench, in *Brown v. Brown* (m), that parol evidence was sufficient to prove the contents of a Will and thereby establish it, so as to revoke a Will of earlier date. And Lord Campbell laid it down generally that parol evidence of the contents of a lost instrument may be received as much when it is a Will as if it were any other. And this case was acted on on several occasions by Sir C. Cresswell (n), and recently by the Court of Appeal in *Sugden v. Lord St. Leonards* (o). But in *Wharram v. Wharram* (p), Sir J. P. Wilde appeared to doubt the soundness of the doctrine in *Brown v. Brown*, by reason of the

Parol evidence
to prove con-
tents of a Will.

it to probate; but see *In the goods of Barber*, L. R., 1 P. & D. 267.

(i) *Trevelyan v. Trevelyan*, 1 Phillim. 149; see also *Parker v. Hickmott*, 1 Hagg. 211, as to granting probate, in its original state, of a Will altered without the testator's concurrence. See also *In the goods of Cooke*, 3 Curt. 737.

(k) *Foster v. Foster*, 1 Add. 462. *Knight & Cook*, 1 Cas. temp. Lee, 413. *In the goods of Leigh* [1692], P. 82. See also *Martin v. Laking*, 1 Hagg. 244, where the widow, after the testator's death, caused his Will to be destroyed, and probate of the draft of such Will was granted.

(l) *Huble v. Clark*, 1 Hagg. 115. *Wharram v. Wharram*, 3 Sw. & Tr. 301, 307. *Moore v. White-*

house, 3 Sw. & Tr. 567.

(m) 8 E. & B. 876.

(n) *In the goods of Gardner*, 1 Sw. & Tr. 109, where the Will had been left, during the mutiny, in India, and probate was granted of the Will as contained in the affidavit. See also *In the goods of Brown*, 1 Sw. & Tr. 32, where the facts were the same as those in *Brown v. Brown*. *Wood v. Wood*, L. R., 1 P. & D. 309.

(o) 1 P. D. 154. See *ante*, p. 318. See also *Woodward v. Gouldstone*, 11 App. Cas. 469.

(p) 3 Sw. & Tr. 301, which case now seems to be overruled. See *per Jessel, M.R.*, in *Sugden v. Lord St. Leonards*, 1 P. D. 154, at p. 239.

provision in the 10th section of the Wills Act that "no Will shall be valid," "unless it be in writing, &c." And the learned judge seemed to think that the current of authorities had somewhat hastily flowed on past the period of the Wills Act, without any notice of that enactment. But with the greatest deference it may be observed that it is somewhat difficult to see how that enactment affects the question; and the learned judge himself on a subsequent occasion, where a case of suppression, or if not of destruction, of the Will was made out, granted administration with the Will annexed to the residuary legatee (q). So where a codicil had been burnt by the testator's order, but not in his presence, as required by the statute, Sir J. Dodson decreed probate of a draft copy (r). And it should seem, that unless in cases of this kind secondary evidence of the Will were allowed to be sufficient, much injustice and impunity for fraud would be permitted.

Probate of Will cancelled by testator while *non compos*.

Double probate where there are several executors.

What is "double probate."

If a Will be wholly or partially cancelled, or destroyed, by the testator whilst of unsound mind, probate will be granted of it as it existed in its integral state, that being ascertainable (s).

Probate granted to one of several executors, enures to the benefit of all (t). Where there are several executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted enures to their benefit and because they have a right to the grant, whether the power be reserved or not. There is, however, what in the Spiritual Court was called a double probate; which is in this manner: The first executor that comes in takes probate in the usual form, with reservation to the rest: Afterwards, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original Will is to be annexed to such probate in the same manner as the first; and in the second grant such first grant

(q) *Podmore v. Whatton*, 3 Sw. & Tr. 449.

(r) In the goods of *Dadds, Dea.* & Sw. 290.

(s) *Scruby v. Fordham*, 1 Add. 74.

(t) *Webster v. Spencer*, 3 Barn. & Ald. 363, by Bayley, J.

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is to be recited. And so on, if there are more that come in afterwards (x).

If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one Will to be proved, one proving of it suffices (y). So if B. is made executor for ten years, and afterwards C. is to be executor, and B. proves the Will, and the ten years expire, C. may administer without any further probate (z).

Probate where there are several executors with distinct powers : or for distinct portions of time.

The Court may grant a limited probate where the testator has limited the executor (a). And it is laid down (b) that if a man makes and appoints an executor for one particular thing only, as touching such a statute or bond and no more, and makes no other executor, he dies intestate as to the residue of his estate, and as to this specialty only shall have an executor, and must have a Will proved : but in case he makes another Will for the residue of his estate, there must be two Wills proved. However, where there is an executor appointed without any limitation, the Court can only pronounce for the Will, or for an absolute intestacy : It cannot pronounce the deceased to be dead intestate as to the residue, though the executor may eventually be considered only as a trustee for the next of kin (c).

Limited probate.

Where an executrix was appointed in a codicil, which gave her a legacy, and nominated her, together with an executor named in a previous Will, executors of the Will and codicil, declaring it to be a part of the Will, and giving them the residue in moieties, it was held that she had a right to propound both the Will and codicil, if she thought proper, though the other executor prayed probate of the

An executor named in a codicil may propound both the Will and codicil.

(x) 4 Burn, E. L. 310, Phillimore's edition. In the goods of Bell, L. R., 2 P. & D. 247.

(y) Wentw. Off. Ex. 31, 14th edit. Bac. Abr. Exors. (C.) 4.

(z) Anon. 1 Freem. 313. Anon. 1 Chan. Cas. 265. See Watkins v. Brent, 1 Mylne & Cr. 104.

(a) 1 Cas. temp. Lee, 280. Davies v. Queen's Proctor, 2 Robert. 413. In the goods of Beer, *ibid.* 349.

(b) Wentw. Off. Ex. 30, 14th edit.

(c) Sutton v. Smith, 1 Cas. temp. Lee, 275 : See Spratt v. Harris, 4 Hagg. 408, 409.

Will alone, and opposed the codicil; for if the codicil was good, it was part of the Will, and gave her an immediate interest in the Will; and if she propounded and proved the codicil alone, the next of kin might afterwards oppose the Will, and force her into a second suit, which would be unreasonable (*d*).

Probate of a Will cannot be had during a *lis pendens* as to a codicil:

Probate of a Will cannot be granted to the executor while a contest subsists about the validity of a codicil; for that being undetermined, it does not appear what is the Will, and the executor cannot take the common oath (*e*).

unless by consent.

In a case (*f*), however, where a question arose as to the validity of a codicil revoking the appointment of a co-executor, and the estate required an immediate representation, probate of the undisputed instruments was granted to the other executors, with consent of the co-executor, reserving all questions (*g*).

Probate of codicil where Will has been proved abroad.

If a Will has been proved abroad, probate of the codicils, if any, must be granted by the Court which granted probate of the Will (*h*).

Executor of executor.

It has already appeared, that where there is a sole executor, or sole surviving executor, the office is transmissible, and his executor becomes the representative of the original testator (*i*): and in such a case, no new probate of the original Will is requisite (*k*).

Probate of the Will of *feme covert* before Married

Where a married woman, before the Married Women's Property Act, 1882, made a Will by virtue of a power, or of

(*d*) *Miller v. Sheppard*, 2 Cas. temp. Lee, 506.

(*e*) *Neagle v. Castlehaven*, 2 Cas. temp. Lee, 246.

(*f*) *Fowles v. Davidson*, 4 Notes of Cas. 149.

(*g*) Where, however, there is no *lis pendens*, but the Court is informed of the existence of codicils abroad, which cannot be produced, the Court will, under special circumstances, grant probate of papers

forming part only of the Will, the executor undertaking to prove the other papers or authentic copies thereof, when they arrive: In the goods of Robarts, L. R., 3 P. & D. 110.

(*h*) In the goods of Miller, 8 P. D. 167.

(*i*) *Ante*, p. 204.

(*k*) *Wankford v. Wankford*, 1 Salk. 309.

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property enjoyed by her separately, such Will, as there has been already occasion to show, might be admitted to probate, without the consent of her husband (*l*). Where the Will sought to be established was made by her under a power, it was held that the instrument creating the power must be pleaded in the allegation of the executor, and exhibited (*m*). The probate, however, of the Will of a feme covert before the Act was not general, but limited to the property over which she had a disposing power (*n*). And her husband was entitled to have a grant of Administration *ceterorum* (*o*).

Women's Property Act, 1882.

Limited form of probate.

When the Will of a married woman, made before the commencement of the Act is tendered for probate on the ground that she had separate property, and the probate is contested, if the Court is satisfied that there is separate property it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is, although, in general, it is the duty of the Court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists (*p*).

Since the commencement of the Married Women's Property Act, 1882, the limitation in the probate of the Will of a married woman, to which reference has been made above, is no longer required, and the Court will make a general grant (*q*).

Probate of Will of *feme covert* since the Married Women's Property Act, 1882:

no longer limited but general grant.

(*l*) See *ante*, p. 50.

(*m*) *Temple v. Walker*, 3 Phillim. 394. In the goods of Monday, 1 Curt. 590. And by Rule 15 (1862), P. R. (Non-contentious) now repealed, it must have been specified in the grant of the probate, &c. See *ante*, p. 53.

(*n*) *Tappenden v. Walsh*, 1 Phillim. 352. *Tucker v. Inman*, 4 M. & G. 1049. *Ledgard v. Garland*, 1 Curt. 286. See In the goods of Boswell, 3 Curt. 744. In the goods of Martin, 3 Sw. & Tr. 1. In the goods of De Pradel, L. R., 1 P. & D. 454. In the goods of

Richards, L. R., 1 P. & D. 156. In the goods of Cubbon, 11 P. D. 169.

(*o*) *Brenchley v. Lynn*, 2 Robert. 441, 471. See 4 M. & G. 398, *per Tindal, C.J.*

(*p*) In the goods of *Tharp*, 3 P. D. 76.

(*q*) In the goods of *Price*, 12 P. D. 137. See also In the goods of *Homfray*, *ib.* 138 n. *Re Lambert*, 39 C. D. 626. These cases were decided upon the New Rules of April, 1887. Rules 15 and 18, of which the following is the substance, as set out in In the

The effect of the general probate is only to enable the executor to get in all the assets of the wife whether she has power to dispose of them or not, and it does not affect the beneficial title to them (r).

*Administratio
caterorum.*

In general cases, if the Will be limited to any specific effects of the testator, the probate shall also be so limited, and an *administratio caterorum* granted (s).

Probate
making out :

deposit of Will
in Registry.

When the Will is proved, the original is deposited in the registry (t), and a copy thereof in parchment is made out under the seal of the Court, and delivered to the executor, together with a certificate of its having been proved; and such copy and certificate are usually styled the probate.

Probate in
fac-simile.

There has already been occasion to explain the nature of a probate in *fac-simile*, and the occasions on which such a probate is granted (u). The operation of it will be further

goods of Price, *ubi sup.* : "In a grant of probate of the Will of a married woman, or the Will of a widow made during coverture, or letters of administration with such Will annexed, it shall not be necessary to recite in the grant, or in the oath to lead the same, the separate personal estate of the testatrix, or the power or authority under which the Will has been, or purports to have been, made. The probate, or letters of administration with Will annexed, in such cases shall take the form of ordinary grants of probate or letters of administration with Will annexed, without any exception or limitation, and issue to an executor, or other person authorised in usual course of representation to take the same : a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy."

(r) *Smart v. Tranter*, 43 C. D. 587.

(s) *Wentw. Off. Ex.* 30, 14th edit. Toller, 67.

(t) See stat. 20 & 21 Viet. c. 77. s. 66, by which provision is made for a place for the deposit of original Wills when proved. *Ante*, p. 262. On one occasion, an original codicil, of which probate had been granted, containing an assignment of 10,000*l.* part of 15,000*l.* secured by a heritable bond in Scotland, was delivered out of the Registry of the Prerogative Court, in order to its being registered in Scotland, and there finally deposited; this being necessary to carry the same into effect, and the codicil itself (termed in Scotland a deed of disposition or assignation) not relating to any property of the testator in this country: In the goods of Nicholson, 2 Add. 333. See also In the goods of Russell, 1 Hagg. 91. *Re Napoleon Bonaparte*, 2 Robert. 290.

(u) *Ante*, p. 273.

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considered hereafter, together with the subject of the effect of probate, and letters of administration generally (x).

If a Will be in a foreign language, the probate is granted of a translation of the same by a Notary Public (y). But it should seem that the Temporal Courts are not bound by it, and may themselves correct any inaccuracy in it (z).

Where the probate is lost, the Spiritual Court never granted a second, but merely an exemplification of the probate from their own records, and such exemplification was evidence of the Will having been proved (a).

The probate may be revoked either on suit by citation (e. g. where the executor, after proof in common form, is cited to prove the Will in solemn form, or even after proof in solemn form, where the probate is shown to have been obtained by fraud, or the Will of which it has been granted is proved to have been revoked, or a later Will made) (b), or on appeal to a higher tribunal. But it will be more convenient to consider the mode of such revocation, and its consequences, at a future stage, conjointly with the revocation of grants of administration (c).

Probate of Will in a foreign language.

Lost probate.

Revocation of probate on citation or appeal.

SECTION VIII.

Of Mandamus to compel Probate.

As matters testamentary in which, before the passing of the Judicature Act, the Court of Probate had exclusive jurisdiction, are by that Act assigned to the Probate Division of the High Court, it seems clear that the power to compel probate by Mandamus no longer exists.

The Queen's Bench Division in which, as the successors of the old Court of Queen's Bench, the right to issue a Manda-

No longer power to compel probate by mandamus.

(x) *Post*, Pt. I. Bk. VI. Ch. I.

(y) Toller, 72.

(z) *L'Fit v. L'Batt*, 1 P. Wms.

526. *Post*, Pt. I. Bk. VI. Ch. I.

(a) *Shepherd v. Shorthose*, 1

Stra. 412.

(b) *Wentw. Off. Ex.* 111, 112,

14th edit.

(c) *Post*, Pt. I. Bk. VI. Ch. II.

mus is vested, is powerless to control by Mandamus the proceedings of any but an Inferior Court; and thus it has no power to superintend or control the Judges of another Division of the same Court, should they exceed their authority or decline to exercise the jurisdiction which they possess.

In the former Editions of this Work, Pt. I. Bk. IV. ch. II. § 8, will be found a reference to the power of the Temporal Courts, formerly existing over the Ecclesiastical Courts exercised by Mandamus or Prohibition.

SECTION IX.

Of what Instruments Probate is necessary, and what Instruments ought not to be proved.

Probate must be obtained of every testamentary instrument operating on personal estate, but not necessarily of one which does not operate on personal estate.

No probate of paper neither disposing of property nor appointing executor.

A codicil, however, merely revoking or confirming former Wills, should be proved.

A Will of lands only ought not to be proved in the Probate Court:

If an instrument be testamentary (*d*), and is to operate on personal estate, whatever may be its form, probate of it must be obtained in the Court of Probate; otherwise its existence cannot be recognized in any Court of law or equity.

A paper which neither disposes of property nor appoints an executor generally speaking has no testamentary character so as to enable the Court to grant probate of it (*e*).

But a codicil, not containing any disposition of property, but simply revoking all former Wills, is of a testamentary nature, and, if proved, ought to be admitted to probate (*f*). So if the executor, after probate, discovers any testamentary paper, he ought to bring it into the Court of Probate, even though it be a mere confirmation of the Will already proved (*g*).

Where, however, a Will *clearly* respects land only, and no personal property, it ought not to be proved in the Court of Probate (*h*).

(*d*) As to what is a testamentary instrument, see *post*, Pt. III. Bk. v. Ch. II. and *ante*, pp. 93, 94, *et seq.*

(*e*) Van Straubenzee v. Monck, 3 Sw. & Tr. 6.

(*f*) Brenchley v. Still, 2 Robert. 162.

(*g*) Weddall v. Nixon, 17 Beav. 160.

(*h*) Habergham v. Vincent, 2 Ves. 230, by Buller, J. In the

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But if a Will is a mixed Will concerning both lands and goods, it must be proved entirely in the Court of Probate (*k*).

So the nomination of executors in a testamentary paper, purporting to dispose of real property only, entitles the document to probate (*l*). And this notwithstanding the renunciation of the executor (*m*). This rule, however, does not hold good in the case of the Will of a married woman made under a power of appointment, and disposing of real property only: for the Will, although it is in the form of a Will as required by the instrument giving the power, is, in fact, a conveyance by means of the appointment exercised, and, although an executor is appointed, the executor takes nothing in his character of personal representative. If, however, a married woman making a Will disposing of realty only, and appointing executors (*n*), has not only a power of appointment given her by the deed, but also a vested interest to her separate use in the real property apart from that power, and she really exercises, not only what rights she had under the power, but the rights which she has beyond it, she is in the position of a *feme sole* with regard to the real estate, and the Will is entitled to probate (*o*).

In the case of such a mixed Will, if there be occasion to prove the devise of the land, in an action concerning it, it was formerly necessary to give the Will itself in evidence; but now if notice is given of the intention to put the probate

secus, of a mixed Will of lands and goods:

or where executors are appointed in a Will of Lands only.

Probate of Will of married woman made under power disposing only of real property:

exception to above rule:

goods of Drummond, 2 Sw. & Tr. 8. In the goods of Bootle, L. R., 3 P. & D. 177. A Will, however, disposing of freehold property which, by the doctrine of equitable conversion, is to be considered as personal^y, is entitled to probate: In the goods of Gunn, 9 P. D. 242. See In the goods of Barden, L. R., 1 P. & D. 325.

(*k*) Partridge's case, 2 Salk. 553. (*l*) O'Dwyer v. Geare, 1 Sw. & Tr. 465. In the goods of Barden, L. R., 1 P. & D. 325. In the goods

of Leese, 2 Sw. & Tr. 442. Brownrigg v. Pike, 7 P. D. 61. In the goods of Cubbon, 11 P. D. 169. In the goods of Hornbuckle, 15 P. D. 149, 151. See also Beard v. Beard, 3 Atk. 72, *ante*, p. 164. See further In the goods of Lancaster, 1 Sw. & Tr. 464.

(*m*) In the goods of Jordan, L. R., 1 P. & D. 555.

(*n*) In the goods of Tomlinson, 6 P. D. 209.

(*o*) In the goods of Hornbuckle, 15 P. D. 149.

in evidence, the probate is sufficient evidence of the Will and its validity, unless the party, to whom such notice has been given, shall himself give notice that he intends to dispute the validity of the Will (*p*).

production of
original Will :
how procured ;

When an original Will is required to be produced in Court, the attendance with it of the proper officer, in whose custody it is deposited, may be procured in the same manner as in other cases where the production of an original record, or instrument in the nature of a record, is required.

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be granted.

If it should be *doubtful* whether some part of the property be freehold, the Ecclesiastical Court always held, that it ought to grant probate; for the obvious reason that the probate may be necessary to the purposes of justice, and no evil can arise from the grant of it (*r*).

When probate
necessary of a
Will made in
execution of a
power.

Where a Will is made in execution of a power, if it relates to personalty, it must be proved in the Court of Probate (*s*).

There has already been occasion to show that this has been determined, in regard to an appointment by the Will of a married woman, which it is now settled, the Courts of Equity will not read, until it has been duly proved as a proper Will in the Court of Probate (*t*). But though a Court of Equity cannot give effect to testamentary papers without probate, it may, perhaps, when necessary, order an enquiry for the very purpose of sending such papers to be proved (*u*).

(*p*) Stat. 20 & 21 Vict. c. 77, sect. 64. See *ante*, p. 263; *post*, p. 481.

(*r*) By Sir John Nicholl, in *Thorold v. Thorold*, 1 Phillim. 8, 9: See also the case of *Durkin v. Johnstone*, Prerog. 1796, decided by Sir W. Wynne, and reported in a note to 1 Phillim. 8.

(*s*) See Sugd. on Pow. 21, 6th edition. *Tattnall v. Hankey*, 2 Moo. P. C. 342, 351, 352, 353. *Goldsworthy v. Crossley*, 4 Hare,

140.

(*t*) If, however, the Will of a married woman, made under a power of appointment, disposes of real property only, it is not entitled to probate, even though it contains an appointment of executors: In the goods of Tomlinson, 6 P. D. 209. But see In the goods of Hornbuckle, 15 P. D. 149, for a qualification of this rule. See *ante*, p. 327.

(*u*) See *Brenchley v. Lynn*, 2

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However, a Will, simply in execution of a power affecting realty, and not even appointing an executor, will be dealt with in Chancery without the interference of a Court of Probate (x).

In *Pelham v. Newton* (y), a testatrix directed her executor to deliver certain parcels sealed up, and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened, and desired those persons would not tell one another what was contained in their respective papers: Sir G. Lee was of opinion that the executors could not safely deliver them unopened; for if they should be called to an inventory, they could not give in one on oath, without knowing what was contained in those parcels; and if they assented to them as legacies, and there should not be assets sufficient to pay the debts, they would be guilty of a *devastavit*: The learned Judge therefore decreed those parcels to be opened in the presence of the Registrar, to see what was contained in them: they were accordingly opened in Court, and they contained bank-notes, some of 20l., and some of 30l. each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the Will: and probate was decreed of the Will, and all the aforesaid papers, to the executors.

In *Inchiquin v. French* (z), Lord Thomond by his Will gave 20,000l. to Sir William Wyndham; and by a deed poll of the same date, which referred to his Will, he declared that the legacy was given to him upon trust for Lord Clare: Sir William Wyndham died in the testator's lifetime, and the

Probate of sealed packets directed by the Will to be delivered unopened to legatees.

Instruments of which probate is not necessary:

Declaration of trust:

Robert. 458, *et seq.*, by Dr. Lushington.

(x) *Per* Bayley, B., 4 Hagg. 64.

(y) 2 Cas. temp. Lee, 46.

(z) 1 Cox, 1. This case is also reported in Ambler, p. 33, and it would seem from the judgment of Hall, V.C., in *Re Fleetwood*, (15 Ch. D. p. 603), that the report

in 1 Cox, upon which Lord Giffard relied in his judgment in *Smith v. Attersoll*, is incorrect in that the question of whether there was a trust was not really decided; but as Hall, V.C., points out, *Smith v. Attersoll* has been referred to in subsequent cases.

deed poll was not proved: The question was, whether, though the legatee named in the Will had died before the testator, the person, who was the *cestui que trust* of the legacy, and was substantially the legatee, was entitled to the 20,000*l.* under the deed poll, which had not been proved as a testamentary paper: Lord Hardwicke held, that the deed poll, though never proved, sufficiently declared the trusts of the legacy of 20,000*l.*, and decreed accordingly.

In *Smith v. Attersoll* (a), a testator bequeathed a legacy to A. and B., in trust for certain purposes, which the Will stated to have been fully explained to them; on the same day a paper writing was signed by A. and B. in which they declared that the bequest was upon trust for six persons, whose names were stated; and after their signature, some lines were added in the handwriting of the testator, by which a seventh person (an unborn child) was admitted to a share of the legacy: Upon a bill, filed by one of the six persons named in the body of the paper writing, Lord Gifford, M.R., recognized the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper.

A Will appointing testamentary guardians:

From the decisions which have taken place, it is quite

(a) 1 Russ. Chanc. Cas. 266. As to the cases in which a Court of Equity will give effect to a trust not disclosed, or not fully disclosed, in the testamentary instrument, and as to what evidence is admissible, see *Moss v. Cooper*, 1 T. & H. 352, 367; *Irvine v. Sullivan*, L. R., 8 Eq. 673. The whole of the cases are reviewed by Hall, V.-C., in *Re Fleetwood*, 15 C. D. 603.

The ground upon which effect is given to non-testamentary documents is not as acts of the testator, but rather as trusts binding on the conscience of the legatee.

If the trust is expressed on the face of the Will, but the trusts are

not fully declared, no trust afterwards declared by a paper not executed as a Will could be binding. *Johnson v. Ball*, 5 De G. & Sm. 85; *Briggs v. Penny*, 3 Mac. & G. 546; *Singleton v. Tomlinson*, 3 App. Cas. 404. But the legatee will not, in such a case, take a beneficial interest, but will be treated as trustee for the next of kin. *Re Boyes*, 26 Ch. Div. 535.

On the same principle the Court will enforce the trust where no trust appears on the face of the Will, provided the Court is satisfied that there has been a communication by the testator and acceptance by the legatee. *Re Boyes*, 26 Ch. D. 531. And it

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clear that it is not necessary that a Will simply appointing testamentary guardians should be proved in the Court of Probate (b).

Nor is it necessary to prove a Will in the Court of Probate, to entitle a legatee to recover a legacy out of real estate (c).

As a Court of Equity considers money directed to be laid out in land, as land, the Court of Probate has no jurisdiction over a devise disposing of property so converted (d).

And where freehold property is by the doctrine of equitable conversion to be considered as personalty, a Will, disposing of it, is entitled to probate (e): but the proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which the Court of Probate has jurisdiction (f).

would appear that a trust by communication with the legatee may be created by a communication subsequent to the Will. *Moss v. Cooper*, 1 J. & H. 352, 367; but the trust must be communicated in the lifetime of the testator. *Re Boyes*, 26 Ch. Div. 531.

It was at one time supposed that parol evidence was not admissible to prove the trusts in cases where the trust is referred to in the Will, and that such evidence was excluded by the effect of the Wills Act, but it would appear from *Re Fleetwood*, *ubi sup.*, that this distinction between the case of a

trust mentioned on the face of the Will and a trust, the existence of which is undisclosed, cannot be supported.

(b) *Gilliat v. Gilliat*, 3 Phillim. 222. *Lady Chester's Case*, 1 Vent. 207. In the goods of *Morton*, 3 Sw. & Tr. 422.

(c) *Tucker v. Phipps*, 3 Atk. 361.

(d) By Lord Hardwicke, in *Pullen v. Ready*, 2 Atk. 590.

(e) In the goods of *Gunn*, 9 P. D. 242. See In the goods of *Barden*, L. R. 1 P. & D. 325.

(f) In the goods of *Lloyd*, 9 P. D. 65.

A Will giving legacies out of real estate:

or disposing of money directed to be laid out in land.

But probate necessary of Will disposing of freeholds considered personalty by equitable conversion.

CHAPTER THE THIRD.

OF THE MAKING AND PROBATE OF THE WILLS OF SEAMEN
AND MARINES.

Wills of seamen and marines.

1 Vict. c. 26,
s. 11 :

IT has already been stated, that the Statute of Frauds contains an exception as to Wills made by "any soldier being in actual military service, or any mariner or seaman being at sea" (a). This exception is continued by the 1 Vict. c. 26, by the 11th sect. of which it is provided and enacted, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act" (b).

With regard to the Wills of seamen and marines and the disposal of their effects, various statutes have been passed from time to time. Those which are now in force are 28 & 29 Vict. c. 72, 28 & 29 Vict. c. 111, and an Order in Council of Dec. 28th, 1865.

28 & 29 Vict.
c. 72.
28 & 29 Vict.
c. 111.

Stat. 28 & 29
Vict. c. 72,
s. 2.
Interpretation
clause.

By stat. 28 & 29 Vict. c. 72, s. 2, the term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen (d).

Sect. 3.
Will made
before entry
ineffectual as
to wages, &c.

3. "A Will made after the commencement of this Act by any person at any time previously to his entering into

(a) See *ante*, pp. 103, 104.

(b) See *ante*, pp. 63, 104, 105.

(d) This definition is not so wide as the meaning which has

been put upon the term "mariner or seaman" within sect. 11 of the Wills Act. See *ante*, p. 105.

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service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty."

4. "A Will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment or instrument with a power of attorney." (e)

Sect. 4.
Will invalid if
combined with
power of
attorney.

5. "A Will made after the commencement of this Act by any person while serving as a seaman or marine, or when he has ceased so to serve, shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

Sect. 5.
Regulations for
Wills of sea-
men, &c., as
to wages, &c.

- (1.) Every such Will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea ;
- (2.) Where the Will is made on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force ;
- (3.) Where the Will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain, or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of

(e) See *ante*, p. 44.

worship in the parish where the Will is executed, or a British consular officer, or an officer of customs, or a notary public.

A Will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the testator under such Will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects."

Sect. 6.
As to Wills
made by
prisoners of
war.

6. "Notwithstanding anything in this or any other Act, a Will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

- (1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public;
- (2.) If the Will is made according to the forms required by the law of the place where it is made;
- (3.) If the Will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea."

Sect. 7.
Payment under
Will not in
conformity
with Act.

7. "Notwithstanding anything in this Act, in case of a Will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or a seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty, to any person claiming to be

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entitled thereto under such Will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with."

By the Order in Council of Dec. 28th, 1865, it is provided: Order in Council, Dec. 28, 1865.
Sect. 3, that in the office of the inspector of seamen's Wills there shall be a repository for the Wills of seamen and S. 3:
marines. Sect. 4, that such Wills intended to pass naval S. 4:
assets (defined by Sect. 2 to be all property affected by 28 & 29 Vict. c. 111) may, as soon as practicable after execution, be sent to the Secretary of the Admiralty to be examined by the inspector. Sect. 5, that the Will is to be registered by the S. 5:
inspector, together with certain particulars therein mentioned. Sect. 6 provides for the return to the intending testator of a S. 6:
Will, which appears to the inspector to be invalid on account of any informality or of non-accordance in any respect with 28 & 29 Vict. c. 72, or otherwise, and for the statement in writing of his objection and the mode of removing it. Sect. 7 S. 7:
provides for the stamping of a Will which appears valid, for its being placed under seal in the repository provided, and for the issue of a receipt for it to the testator. Sect. 8 provides S. 8:
that: "With reference to every such Will the inspector shall also proceed as follows:—(1) He shall, with all convenient speed, issue to the person appointed executor, if any, a cheque of the will, not giving any information respecting the testator's disposition of his property, but containing directions as to the steps to be taken on the testator's death. (2) If there is not any person appointed executor, then, with the assent of the testator, either implied by the mode of transmission of the Will to the admiralty office or expressed, but not otherwise, he shall with all convenient speed issue to the residuary or the universal legatee, or other person most beneficially interested under the Will, a cheque in lieu of the Will, containing directions as to the steps to be taken on the testator's death. (3) If in any such last mentioned case, by reason of the absence of such assent, a cheque is not issued

in the testator's lifetime then he shall, with all convenient speed, after the testator's death issue to the residuary or the universal legatee, or other person most beneficially interested under the Will, a cheque in lieu of the Will, containing directions as to the steps to be taken in consequence of the testator's death."

- s. 9: Sect. 9 provides for the case of a Will not deposited by the testator in his lifetime that it shall be sent as aforesaid by the executor or other person having possession of it. Sect. 10 contains the same provisions for Wills deposited after the testator's death as Sect. 5. Sect. 11 provides in cases where the Will appears invalid, as in Sect. 6, that the inspector shall as soon as may be give notice in writing to the executor, or if none to the residuary or universal legatee, or other person most beneficially interested under the alleged Will, informing him that it is stopped and stating the reason.
- s. 12: Sect. 12 provides that where the Will appears valid the inspector shall have it stamped and issue to the executor, or if none to the residuary or universal legatee, or other person most beneficially interested under the Will, a cheque in lieu of the Will containing directions as to the steps to be taken in consequence of the testator's death. Sect. 13. "Where a seaman or marine dies leaving a Will, and a cheque has been issued in pursuance of the foregoing provisions, the following steps shall be taken (in cases where this course of proceeding is applicable) by and with respect to the holder of the cheque:—(1) The officiating minister of the parish or district parish wherein the holder of the cheque resides shall on his request examine him and two inhabitant householders of the parish produced by him for the purpose. (2) In the presence of the minister, the holder of the cheque shall sign the application, and the householders shall sign the certificate subjoined to the cheque (all blanks being first filled up according to truth, and the minister having first read over to the holder of the cheque and householders the caution printed on the cheque), for which purpose the holder of the cheque and householders shall attend at such time and place as the
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minister appoints. (3) The minister being, on examination of the holder of the cheque and householders, satisfied of the truth of their statements, and of the holder of the cheque being the executor, or other person therein described as qualified to act, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, colour of eyes and hair and age of the holder of the cheque and of any observable peculiarities of person about him, and shall certify to the several particulars by subscribing his signature thereto. (4) The holder of the cheque shall, before signing the application, pay to the minister a fee of 2s. 6d. for his trouble in the matter. (5) The application and certificates being completed, the minister shall return them with the cheque addressed as directed."

Sect. 14. "If the inspector, on the return of the cheque, s. 14: application, and certificates, is satisfied of the right of the claimant he shall proceed as follows:—(1) In case representation is required or intended to be taken out, he shall indorse on the original Will a certificate (in such form and to such effect as he thinks fit) to enable the claimant to take out representation, and shall deliver the Will to the claimant; and probate, obtained in accordance with the certificate, being produced to the inspector and registered and being indorsed by him as available for receipt of naval assets, shall be so available. (2) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without probate."

Sect. 15. "If the inspector, on the return of the cheque, s. 15: application, and certificates, is not satisfied of the right or fitness of the claimant, he may (by indorsement on the original Will) certify to that effect, and that he declines to interfere; or if he thinks fit, he may (by indorsement on the original Will) certify his objections for the information of the Court out of which representation would be taken, and if the Court

thinks fit to grant probate to the claimant, the same, being produced to the inspector and registered, shall be indorsed by him as available for receipt of naval assets and shall be so available accordingly."

s. 16 :

Sect. 16 provides that the minister shall advise the admiralty by letter of his reasons if he is not satisfied that the holder of the cheque is the person qualified to act according to it. Sect. 17 provides that, where probate has been obtained without the inspector's certificate, and naval assets form part of the effects, the inspector may, if satisfied that representation has been obtained by the proper person, admit the probate as authority for the receipt of naval assets by indorsement thereon, and that it shall be available accordingly.

17 & 18 Vict
c. 104.

For further information as to the disposal of money and effects under the control of the admiralty belonging to deceased officers, seamen, and marines of the Royal Navy, and marines and other persons, see stat. 28 & 29 Vict. c. 111, the Order in Council just referred to and Tristram & Coote's Probate Practice, Pt. I. Ch. IV. With regard to the Wills of merchant seamen, the Merchant Shipping Act (17 & 18 Vict. c. 104) provides, by Sections 200 and 201, for the mode of payment by the Board of Trade of the money and effects of deceased seamen and apprentices.

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BOOK THE FIFTH.

OF THE ORIGIN OF ADMINISTRATION : AND OF THE
APPOINTMENT OF ADMINISTRATORS.

CHAPTER THE FIRST.

IN WHAT COURT ADMINISTRATION MUST BE TAKEN OUT : AND
THEREWITH OF WHAT MAY BE DONE BY THE ADMINISTRATOR
BEFORE LETTERS OF ADMINISTRATION ARE GRANTED.

IN case a party makes no testamentary disposition of his
personal property, he is said to die intestate (*a*) : the conse-
quences of which it is now proposed to consider.

SECTION I.

*In what Court the Letters of Administration shall be
obtained.*

In ancient time, when a man died without making any
disposition of such of his goods as were testable, it is said
that the king, who is *parens patriæ*, and has the supreme
care to provide for all his subjects, used to seize the goods
of the intestate, to the intent that they should be preserved
and disposed for the burial of the deceased, the payment of
his debts, to advance his wife and children, if he had any,
and if not, those of his blood (*b*). This prerogative the King
continued to exercise for some time by his own ministers of
justice, and probably in the County Court, where matters
of all kinds were determined ; and it was granted as a fran-

Ancient prero-
gative of the
crown :

(a) 2 Black. Comm. 494.

(b) Hensloe's case, 9 Co. 38, b.

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chise to many lords of manors, and others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts (c). Afterwards the crown, in favour of the Church, invested the prelates with this branch of the prerogative: for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased, than the Ordinary, who all his life had the cure and charge of his soul. The goods of the intestate being thus vested in the Ordinary, as trustee (d) to dispose of them *in pios usus*, it has been said that the clergy took to themselves (under the name of the church and poor,) the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children had been deducted, without paying even his lawful debts and charges thereon: until by stat. Westm. 2, (13 Edw. I. c. 19), it was enacted that the Ordinary should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that executors were bound in case the deceased had left a Will (e). However, in *Snelling's case*, it was resolved that, if the Ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the stat. West. 2 was made in affirmance of the common law (f). But though the Ordinary was (either at common law, or by force of this

(c) 2 Black. Comm. 494; see *ante*, p. 236.

(d) The clergy had never, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purpose; *Dyke v. Walford*, 5 Moo. P. C. 434.

(e) 2 Black. Comm. 495. The 32nd article of the Magna Charta, extorted from King John, expressly provides against these abuses; but

it is a curious fact, and one which strongly marks the influence of the papal power in England at that period, that this article was wholly omitted in the Magna Charta of Hen. III.: Note to *Warwick v. Greville*, 1 Phillim. 124, by the learned reporter.

(f) 5 Rep. 82, b. See also *Henslow's case*, 9 Rep. 39, b, where Lord Coke lays down the same law, and cites several authorities in support of it: Com. Dig. Administrator (A.).

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statute), liable to the creditors for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in his hands, to be applied to whatever purposes the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the Legislature to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the statute of 31 Edw. III. st. 1, c. 11, provides, "that in case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods: which persons so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the dead: and shall answer also in the King's Court, to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

This is the original of administrators, as they stood at the time of the passing of the Probate Act (1857), 20 & 21 Vict. c. 77 (g). They were the officers of the Ordinary appointed by him in pursuance of the statute (h), and their title and authority were derived exclusively from the Ecclesiastical Judge, by grants which are usually denominated letters of administration.

But there has already (i) been occasion to show that by the 3rd section of the Court of Probate Act (1857), the jurisdiction of the Ecclesiastical and all other Courts to grant letters of administration of the effects of deceased persons was abolished; and by sect. 4 (k), that jurisdiction was to be exercised in the Queen's name by the Court of Probate.

The jurisdiction of the Court of Probate is now exercised

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By the Court
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(1857), s. 3,
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Ecclesiastical
Courts to grant
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is abolished.
By sect. 4 to be
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(g) 2 Black. Comm. 495.

(h) *Ibid.*

(i) *Ante*, p. 237, *et seq.*

(k) *Ante*, p. 237.

cised by Probate Division of High Court.

by the Probate Division of the High Court of Justice to which it was transferred by the Judicature Act (l).

SECTION II.

What may be done by an Administrator before Letters of Administration are granted.

Generally an administrator cannot act before letters :

It has been shown that an executor may perform most of the acts appertaining to his office, before probate (m). But with respect to an administrator, the general rule is, that a party entitled to administration can do nothing as administrator before letters of administration are granted to him; inasmuch as he derives his authority, not like an executor from the Will, but entirely from the appointment of the Court (n).

he cannot commence action at law :

Thus it was always held at Law that an executor might commence an action before proving the Will, and it was sufficient if he had probate in time for his declaration (o), yet letters of administration must issue before the commencement of a suit at Law by an administrator; for he has no right of action until he has obtained them (p).

although he may commence action in Chancery Division.

In Chancery, however, the practice was not quite so strict, for a bill in Chancery could be filed before a plaintiff had taken out letters of administration and it was sufficient to have them at the hearing (q), but the bill had to allege that

(l) 36 & 37 Vict. c. 66, sect. 16. See *ante*, p. 239.

(m) *Ante*, p. 249, *et seq.*

(n) *Wankford v. Wankford*, 1 Salk. 301, by Powys, J.

(o) See *ante*, pp. 254, 255.

(p) *Martin v. Fuller*, Comb. 371. Com. Dig. Admon. B. 9; 1 Salk. 303, by Powell, J. *Wooldridge v. Bishop*, 7 B. & C. 406. An administrator with the Will annexed has no more right in this respect than any other administrator. *Phillips v. Hartley*, 3 C.

& P. 121.

(q) *Fell v. Lutwidge*, Barnard. Chanc. Cas. 320, by Lord Hardwicke, who observed that it was different at law. *Horner v. Horner*, 23 L. J. Ch. 10. See also as to the relation of the letters obtained after bill filed. *Humphreys v. Humphreys*, 3 P. Wms. 351; *Bateman v. Margerison*, 6 Hare, 496. But see *Simons v. Milman*, 2 Sim. 241; *Jones v. Howells*, 2 Hare, 353. See *ante*, p. 256, note (g).

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they were already obtained (*r*). This difference of practice seems to remain notwithstanding the Judicature Act.

So if an executor releases before probate, such act will bind him after he has proved the Will (*s*); but if a man releases and afterwards takes out letters of administration, it will not bar him: for the right was not in him at the time of the release (*t*).

A release by an administrator before letters not binding.

So though an executor may assign a term for years of the testator, before probate, yet an assignment by an administrator before letters is, it seems, of no validity (*u*). Again, if the deceased was a tenant from year to year, a surrender of this leasehold interest cannot be made by a next of kin before taking out letters of administration (*v*).

Assignment or surrender by administrator before letters not valid.

In *Doe v. Glenn* (*x*), the lessee of premises, under a condition of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances: his brother administered *de son tort*; and agreed with the landlord to give him possession, and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear: The brother afterwards took out letters of administration: And it was held, that his agreement as administrator *de son tort* did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made demand of the rent according to the common law, or proceeded by ejectment according to stat. 4 Geo. II. c. 28.

Accordingly it was held in a subsequent case (*y*), that an administrator was not estopped by a mortgage he had made of the premises in dispute at a time prior to his having become administrator.

(*r*) *Humphreys v. Ingledon*, 1 P. Wms. 753; *Moses v. Levi*, 3 Y. & Coll. 359, 366.

(*s*) *Ante*, p. 250.

(*t*) *Middleton's case*, 5 Co. 28, *b*.

(*u*) 3 *Preston on Abat.* 146. See *Bacon v. Simpson*, 3 Mees. & W.

87, *per Parke*, B.

(*v*) *Rex v. Great Glenn* (Inhabitants of), 5 B. & Adol. 188.

(*x*) 1 Adol. & Ell. 40.

(*y*) *Metters v. Brown*, 1 Hurl. & C. 686.

Notice to be given as administrator not effectually given before letters.

Instances of valid acts, though done before administration granted :

Where it had been agreed by articles of partnership that the executor or administrator of a deceased partner should have the option of succeeding to the share of the deceased in the partnership business and effects on giving notice within three calendar months of the decease to the surviving partners, it was held that a notice given by the administrator of the deceased partner within the three months of his death, but before taking out letters of administration, was not an effectual notice within the meaning of the indenture, for that the letters of administration had not relation back to the act of giving notice, so as to clothe him with the character of administrator at that time (z).

Yet cases may certainly be found, where the letters of administration have been held to have a relation to the death of the intestate, so as to give a validity to acts done before the letters were obtained. Thus if a man takes the goods of the intestate as executor *de son tort*, and sells them, and afterwards obtains letters of administration, it seems the sale is good (a). So in *Whitehall v. Squire* (b), where an intestate had delivered to the defendant a horse to depasture, and the plaintiff, before administration granted, desired the defendant to bury the intestate decently, who thereupon buried him, and the plaintiff agreed that the defendant should keep the horse in part satisfaction of the charges; and afterwards the plaintiff took administration, and brought trover for the horse; it was held by Dolben and Eyre, Justices (Holt, C. J., *dissentiente*), that the plaintiff was bound by the agreement, and could not maintain the action. The principle, however, of this decision appears to have been, that the plaintiff, being a *particeps criminis* in the very act of which he complained, should not be permitted to recover upon it against the person with whom he colluded (c).

(z) *Holland v. King*, 6 C. B. L. R. 1 Eq. 90, 100, *ante*, p. 215, 727.

(a) *Kenrick v. Burgess*, Moor. 126. *Godolph. Pt. 2, c. 8, a. 5*, p. 99, 4th edition. *Hill v. Curtis*,

note (n).

(b) 1 Salk. 295.

(c) *Mortford v. Gibson*, 4 East, 445, by Lord Ellenborough. In

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Other instances, of the relation of the letters of administration to the death of the intestate, will be found in a subsequent part of this Treatise (*d*).

But it may here be observed, that it has been lately laid down that such relation exists only in those cases where the act done is for the benefit of the estate: And accordingly, in a case where the widow of an intestate had remained in the possession of her husband's property for some time after his decease, and the intestate's son had not interfered in any way with the property, which was seized under a writ of *fi. fa.* issued against the widow, and the son afterwards took out administration, it was held that there was no evidence from which the administrator's assent to the widow's taking the property could be implied: And by *Parke, B.*, even if there had been, the estate was not bound by it, as the act to which the assent was given did not benefit the estate (*e*).

Where a question was pending in the Ecclesiastical Court, as to a party's right to a grant of letters of administration, and such party possessed himself of a portion of the goods of the deceased before he had established his title, *Sir G. Lee* decreed that he should give such security for the safety of the goods as the Court should approve (*f*).

only when done
for the benefit
of the estate.

Security demanded by the
Ecclesiastical
Court from
parties possess-
ing the assets
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granted.

Stewart v. Edmonds, Sittings after Hil. Term, 1828, *coram* Abbott, C. J., the intestate had sent some plate to the defendant, a silversmith, for safe custody, and was at the same time indebted to him in a sum exceeding the value of the plate: The plaintiff, after the death of the intestate, and before he obtained letters of administration, assented to the defendant retaining the plate, in satisfaction of his debt; he afterwards took out administration, and brought trover for the plate: For the defendant, *Whitehall v. Squire* was cited; but the C. J. held that the assent was not binding upon the administrator. See further, *Accord, Morgan v. Thomas*, 8

Exch. 305, by *Parke, B.* See also *Parsons v. Mayesden*, 1 Freem. 152, where it was laid down, that if a man takes the goods of the deceased by the consent of him to whom administration is afterwards granted, this is no defence, if he is sued as executor *de son tort*. But see *Hill v. Curtis*, *ubi sup.*

(*d*) *Ante*, Pt. II. Bk. I. Ch. I. As to the right, founded on mere possession, to bring actions against wrong-doers, without producing letters of administration, see *ante*, p. 253.

(*e*) *Morgan v. Thomas*, 8 Exch. 32.

(*f*) *Jones v. Yarnold*, 2 Cas. temp. Lee, 570.

CHAPTER THE SECOND.

OF THE GRANT OF GENERAL ORIGINAL ADMINISTRATION IN
CASES OF TOTAL INTESTACY.

SECTION I.

To whom General Administration is to be granted.

Stat. 31 Edw.
III., stat. 1,
c. 11, adminis-
tration to be
granted to the
nearest and
most lawful
friends :

Stat. 21 Hen.
VIII. c. 5,
s. 3, to the
widow or next
of kin, or both
at discretion.

IT has already appeared that the stat. 31 Edw. III. stat. 1, c. 11, provides, that, in cases of intestacy, "the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods" (a). The power of the Ecclesiastical Judge was a little more enlarged by the statute 21 Hen. VIII. c. 5, s. 3, which provides, that in case any person die intestate, or that the executors named in any testament refuse to prove it, the Ordinary shall grant administration, "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good:" and the same section goes on to enact, that "where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator, or person deceased, and where any person only desireth the administration, as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

Exclusive right
of the husband
to be the wife's
administrator :

Before inquiring into the rights of those persons expressly pointed out in the above statutes, it is proper to consider the right of the husband to be the administrator of his wife. This right belongs to the husband exclusively of all other persons (b), and the Ordinary has no power or election to

(a) *Ante*, p. 341.

(b) *Humphrey v. Bullen*, 1 Atk. 459.

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grant it to any other (c). The foundation of this claim has been variously stated: By some it is said to be derived from the statute of 31 Edw. III. on the ground of the husband's being "the next and most lawful friend" of his wife (d): while there are other authorities, which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes (e). But the right, however founded, is now unquestionable; and is expressly confirmed by the statute 29 Car. II. c. 3, which enacts, that the Statute of Distributions (22 & 23 Car. II. c. 10,) "shall not extend to the estates of *femes covert* that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act."

The Married Women's Property Act, 1882, has not altered the devolution of the undisposed of separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.

Thus, where a married woman, who had a power of appointment over certain trust funds, and was also possessed of separate estate, her title to which had accrued before the Married Women's Property Act, 1882, but including also a considerable amount of savings of the income of such estate accrued since the Act, died in 1887, having in the same year made a Will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property, it was held that on

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Women's Pro-
perty Act,
1882:

(c) Sir George Sand's case, 3 Salk. 22.

(d) 3 Salk. 22. Elliott v. Gurr, 2 Phillim. 19; and it would seem that this is the right view.

Fettiplace v. Gorges, 1 Ves. 46; Re Lambert's Estate, 39 C. D. 626.

It is to be remembered that ad-

ministration was not necessary to enable the husband to take his deceased wife's chattels or chattels real though it was necessary to enable him to take her outstanding choses in action.

(e) Com. Dig. Administrator (B. 6). Watt v. Watt, 3 Ves. 247.

the death of the testatrix the title of her husband to her undisposed of separate estate accrued, and that the executors of her Will became trustees for him, and not for the next of kin of the testatrix (*f*).

The separate use, whether created by Statute or settlement, is exhausted when the wife dies without making a disposition (*g*).

This right of administration to the wife is not an ecclesiastical, but a civil right of the husband, though it is a right to be administered in the Court of Probate (*h*).

where the marriage was voidable the husband is entitled to administration :

Though a marriage be voidable, by reason of some canonical disability (*e. g.* on account of corporal infirmities and formerly as being within the prohibited degrees of consanguinity or affinity) yet the husband is entitled to the administration of the wife, unless sentence of nullity was declared before her death (*i*). But where the marriage took place under one of the civil disabilities (such as prior marriage, want of age, idiocy, and the like, and since 5 & 6 Will. IV. c. 54, by being within the prohibited degrees of consanguinity or affinity), the contract of marriage is absolutely void *ab initio*; and consequently the husband cannot be entitled to take administration. Thus, where it appeared that the woman was of unsound mind at the time of the celebration of the marriage, the husband was refused administration of her effects, and condemned in costs (*k*).

secus, where it was void.

Administration to wife dying after a protection order.

Where a wife, having been deserted by her husband, has obtained a protection order, under stat. 20 & 21 Vict. c. 85, s. 21 (*l*), and afterwards dies in the lifetime of her husband, intestate, the Court will decree administration, limited to such personal property as she acquired since the desertion (without specifying of what that property consisted), to the next of kin of the wife (*m*).

(*f*) *Re Lambert's Estate*, 39 C. D. 626.

(*g*) *Cooper v. Macdonald*, 7 C. D. 288.

(*h*) By Sir J. Nicholl, in *Elliott v. Gurr*, 2 Phillim. 19, 20.

(*i*) *Elliott v. Gurr*, 2 Phillim. 19.

(*k*) *Browning v. Reane*, 2 Phillim. 69.

(*l*) See *ante*, p. 55.

(*m*) In the goods of Worman

Upon the bankruptcy of the husband his right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy (*n*).

Husband a bankrupt.

Where a husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property, and she died intestate, leaving separate property of which she had become possessed by virtue of the deed, the Court, notwithstanding the husband objected, granted letters of administration to her father limited to that property (*o*).

Administration to wife living apart from husband under separation deed.

It should seem that a man convicted of bigamy, in respect of his marriage with the intestate, may, nevertheless, propound his interest as the lawful husband of the deceased, in a suit touching the administration of her effects in the Ecclesiastical Court: and may succeed in such suit on proof shown of his not having been guilty of the crime, notwithstanding his said conviction be pleaded and proved (*p*).

Husband convicted of bigamy:

In case the wife died intestate, and afterwards the husband died without having taken out administration to her, the Ecclesiastical Court at one time considered itself bound by the statute to grant administration to the next of kin of the wife, and not to the representatives of the husband (*q*). But such administrator was considered in equity as a trustee for the representatives of the husband (*r*).

by the old practice if the husband died before he obtained administration, it was granted to the wife's next of kin

1 Sw. & Tr. 513. See also In the goods of Faraday, 2 Sw. & Tr. 369; In the goods of Weir, 2 Sw. & Tr. 451; In the goods of Stephenson, L. R. 1 P. & D. 289. It is necessary, generally speaking, that the husband should be cited: In the goods of Brighton, 34 L. J., P. & M. 55. He has no right to the administration if the marriage has been dissolved on the ground of his adultery and desertion. In the goods of Hay, L. R. 1 P. & D. 51; 35 L. J., P. & M. 3. Nor it seems, in cases where the wife has obtained a decree of judicial separation. See 20 & 21 Vict.

c. 85, sect. 21.

(*n*) In the goods of Turner, 12 P. D. 18.

(*o*) Allen v. Humphrys, 8 P. D. 16. See also In the goods of Moore [1891] P. 299.

(*p*) Wilkinson v. Gordon, 2 Add. 152. See 1 Phillips on Evidence, 336 *et seq.*, 7th edition.

(*q*) Reece v. Strafford, 1 Hagg. 347. See also the other cases reported in the Appendix to 2 Haggard.

(*r*) Cart v. Rees, cited in Squibb v. Wyn, 1 P. Wms. 381. Humphrey v. Bullen, 1 Atk. 458.

For according to the course of decisions of Courts of Equity, and the practice of the Ecclesiastical Courts, and of the Court of Probate, the title of the husband to the undisposed of personality of the wife has uniformly prevailed (s).

In the case of *In the goods of Gill (t)*, Sir John Nicholl adverted to the inconvenience of this rule of granting administration to those who have no beneficial interest, and its defiance of all principles : and added that he felt inclined, if the point should come before the Court in a contested form, to send it up to the Court of Delegates for a deliberate reconsideration. If the persons, who, at the time of the wife's death, were her next of kin, die before the grant of administration, it has always been held that the Court may exercise its discretion, and grant administration to the party who has the interest (u).

but by the modern practice, it shall be granted to the husband's representative, unless the property belongs to the wife's next of kin :

And in a subsequent case (x) that learned Judge granted administration *de bonis non* of a feme covert to the representatives of the husband, an appearance having been entered, and administration prayed by the next of kin of the wife, and observed that he should have done the same if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the property belonged to the wife's next of kin : And the learned Judge desired that it might be understood in the Registry that this was to be the rule for the future, unless special cause to the contrary be shown (y). And the course in the Courts now is in all

(s) *Re Lambert's Estate*, 39 C. D. 626, 635.

(t) 1 Hagg. 341.

(u) *Ib.*, 341, 344.

(x) *Fielder v. Hanger*, 3 Hagg. 769.

(y) Administration of the effects of a former wife was refused to the representatives of a second wife who had taken out administration to her husband, the next of kin of her husband not having been cited :

In the goods of Sowerby, 2 Curt 852. See *In the goods of Bell*, 1 Sw. & Tr. 288. If the husband's representatives are several administrators, they must all join in taking out the administration to the wife ; for it is not the practice to make a subsequent grant to one alone of co-administrators : *Secus* as to co-executor : In the goods of Nayler, 2 Robert. 409.

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cases where the wife has predeceased her husband, to grant to the representatives of the husband alone letters of administration to the wife (z). But if the next of kin are entitled to the beneficial interest (as by settlement), the administration is still to be decreed to them; because the principle is that the grant ought to follow the interest (a).

It must be observed, however, that the husband's next of kin must constitute themselves his legal personal representatives before they have any claim to administer to the wife's estate (b).

husband's next of kin must first constitute themselves his legal personal representatives :

The case of *Gutteridge v. Stilwell* (c), in which Lord Brougham appears to have acted inconsistently with this doctrine, must be considered overruled (d).

It appears to have been ruled in the Prerogative Court, that where the husband and wife are drowned in the same ship, they must be presumed to have perished at the same moment unless proof can be obtained as to the exact time of the death of either (e). At all events, in such cases, in order to entitle the husband to the wife's property it must be proved that he survived her; and consequently the administration thereof must be granted to her next of kin, if his representative cannot give any such proof (f).

husband and wife drowned in the same ship.

(z) *Per* Lord Hatherley in *Partington v. Att.-Gen.*, L. R. 4 H. L. 100, 109.

(a) In the goods of *Pountney*, 4 Hagg. 289.

(b) In the goods of *Crause*, 1 Sw. & Tr. 146. *Attorney-General v. Partington*, 3 Hurlst. & C. 193, 206; L. R., 4 H. L. 100. In the goods of *Harding*, L. R., 2 P. & D. 304. See *post*, Pt. II. Bk. III. Ch. I. § III.

(c) 1 M. & K. 486.

(d) *Partington v. Att.-Gen.*, L. R., 4 H. L. 100. See also *Loy v. Duckett*, 1 Cr. & Ph. 312. His lordship there said that Sir J. Leach's view was more correct than Lord Brougham's, because

it would follow from Lord Brougham's that even where an executor had assented to a legacy he might still sue for the fund out of which the legacy was to be paid on the strength of his legal title without making the legatee a party which would in fact be administering the fund in the absence of the owner. See also *Pennington v. Buckley*, 6 Hare, 459, by Wigram, V.-C.

(e) In the goods of *Selwyn*, 3 Hagg. 784. 1 Curt. 705. But see *Underwood v. Wing*, 4 De G. M. & G. 633. *Post*, Pt. III. Bk. III. Ch. II. § v. where this subject is more fully considered.

(f) *Satterthwaite v. Powell*,



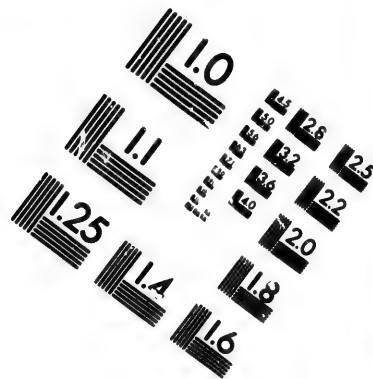
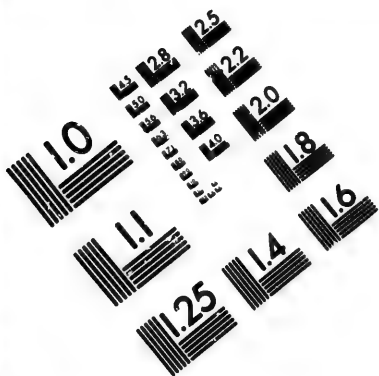
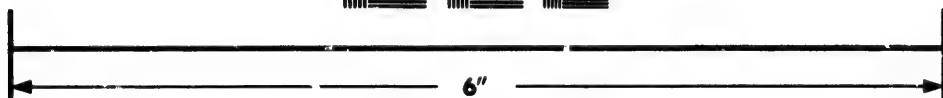
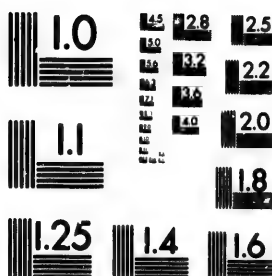


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In what cases before the Married Women's Property Act, 1882, the Will of the wife might control the husband's right to administer :

law since Married Women's Property Act :

administration where wife is executrix of another.

It has already appeared that in several cases, even before the Married Women's Property Act, 1882, a feme covert might make a Will: and it remains to consider to what extent her Will operated as a bar to the husband's right to be her administrator.

In such cases the husband's right was wholly or partially barred according to the extent of the power, or the husband's agreement as the case might be.

Since the passing of the Married Women's Property Act, 1882, these authorities have become of no moment except in cases excluded from the operation of that Act (*g*). As has been pointed out, a grant of Probate of the Will of a married woman is now unlimited, and there is no *cæterorum* grant (*h*).

If the wife be executrix to another, and dies intestate, then, as to the goods which she had in that capacity, administration must not be granted, generally speaking, to her husband (*i*). In fact, in this case, the administration is not of the goods of the wife but *de bonis non* of her testator, *cum testamento annexo*. Consequently, the administration must be granted according to the rules established with respect to that species of grant, which will be explained in the subsequent chapter (*k*).

Of the right of the widow :
The Ordinary may grant administration to her or next of kin, or to them jointly :

The subject now proceeds to the right of the widow and next of kin under the statutes. And first, as to the right of the widow, the stat. 21 Hen. VIII. c. 5, s. 8, directs that the Ordinary shall grant administration "to the widow or the next of kin or to both" at his discretion (*l*): Therefore,

1 Curt. 705. In the goods of Wheeler, 31 L. J., P. M. & A. 40. *Post*, Pt. I. Bk. v. Ch. III. § 1.

(*g*) For those cases see Williams Exors., 8th Ed., pp. 420 and 421.

(*h*) See *ante*, p. 323.

(*i*) Smith v. Jones, Bulstr. 45. Jones v. Roe, W. Jones, 176. Anon. 3 Salik. 21.

(*k*) Sections 1, 2.

(*l*) Sir C. Crosswell in the case of In the goods of Browning, 2 Sw. & Tr. 634, held that the Court is precluded by this statute from making a joint grant to a widow and one of the persons entitled in distribution (but not next of kin), even with the consent of the next of kin, and of all the other persons entitled in

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where it was moved for a mandamus to the official of the Bishop of Gloucester to commit administration to the widow of an intestate, the Court refused the motion, saying, that it would be to deprive the Ordinary of his election in granting it to her, or the next of kin (*m*).

The statute further directs the Ordinary, in his discretion, to grant administration to *both* the widow and the next of kin;—and it has been held that the grant may be to them both jointly, or both separately, by committing several administrations of several parts of the goods of the intestate (*n*). Thus in a case where a man died intestate, leaving a wife and brother, the Ordinary granted the administration of some particular debts to the brother, and of the residue to the wife: And a mandamus was moved for, to grant administration to the wife: But by the Court: The Ordinary may grant administration to the brother as to part, and to the wife for the rest; in which case neither can complain, since the Ordinary need not have granted any part of the administration to the party complaining: But if the intestate leave a bond of 100*l.*, the Ordinary cannot grant administration of 50*l.* to one person and 50*l.* to another, because this is an entire thing (*o*).

administration may be granted to them both jointly or both separately:

But the Court prefers a sole to a joint administration (*p*),

the election of the Court is in favour of the widow:

distribution, and that the 73rd section of the Court of Probate Act, 1857 (see *post*, pp. 383, 384), did not, under the circumstances of the case, enable him to do so. But in a later case Sir J. P. Wilde held that the Court had power under sect. 73 of the Probate Act, 1857, to make a joint grant of administration to the next of kin and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient. In the goods of Grundy, L. R., 1 P. & D. 459.

(*m*) Anon., 1 Stra. 525.

(*n*) 1 Roll. Abr. tit. Exor. (D.) pl. 1, p. 908. 4 Burn, E. L. 361, Phillimore's edition.

(*o*) Fawtry v. Fawtry, 1 Salk. 36.

(*p*) Where a joint grant is made to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made. In the goods of Newbold, L. R. 1 P. & D. 285. But the consent of a minor of twenty years and six months was acted upon in the goods of Dickinson [1891], P. 292.

widow set
aside for good
cause :

and never forces a joint one : and the election of the judge is in favour of the widow, under ordinary circumstances (*g*). But the Court has always held that administration may be granted to the next of kin, and the widow be set aside upon good cause (*r*) ; for instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement (*s*), or where she is a lunatic (*t*), or where she has eloped from her husband, or cohabited in his lifetime with another man (*u*), or has lived separate from her husband (*x*). But the circumstance of the wife having married again is no valid objection (*y*). However, if the deceased left children, one of whom, supported by the rest, applies for administration, the second marriage *might* induce the Court to prefer the child (*z*).

a divorce
according to
foreign law
allowed in a
question of
granting ad-
ministration
to a second
wife :

Where the intestate had married a first wife in Denmark, both parties being domiciled there, from whom he was divorced by a contract of separation and other proceedings amounting to a divorce *a vinculo matrimonii* according to the Danish law, and then married a second wife ; such second wife was

(*g*) *Stretch v. Pynn*, 1 Cas. temp. Lee, 30. *Goddard v. Goddard*, 3 Phillim. 638. See also *Atkinson v. Barnard*, 2 Phillim. 317. But administration of the effects of a domiciled Scotchman was granted to the brother (the next of kin of the deceased) without citing the widow, a similar grant having already been made in Scotland : In the goods of *Rogerson*, 2 Curt. 656.

(*r*) See *Accord*. In the goods of *Anderson*, 3 Sw. & Tr. 489.

(*s*) *Walker v. Carless*, 2 Cas. temp. Lee, 560.

(*t*) In the goods of *Williams*, 3 Hagg. 217. In the goods of *Dunn*, 5 Notes of Cas. 97. See, however, *Alford v. Alford*, Dea. & Sw. 322, where Sir J. Dodson held

the committee of a lunatic widow entitled preferably, as the widow herself would be, unless good cause is shown by the next of kin.

(*u*) *Fleming v. Pelham*, 3 Hagg. 217, note (*b*). *Conyers v. Kitson*, 3 Hagg. 556. It should be noticed that where an application is made for a grant of administration to a person other than the widow on the ground of the widow's misconduct, the Court will require the widow to be cited. In the goods of *Middleton*, 14 P. D. 23.

(*x*) *Lambell v. Lambell*, 3 Hagg. 568. See *Chappell v. Chappell*, 3 Curt. 429.

(*y*) *Webb v. Needham*, 1 Add. 494.

(*z*) *Ibid.* 496.

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allowed by the Prerogative Court to take out administration to the husband (a).

If a wife has been divorced *a mensa et thoro*, for adultery on her part, she forfeits, it should seem, her right to the administration (b).

wife divorced
*a mensa et
thoro.*

It now becomes necessary to inquire, who are the "next and most lawful friends," and the "next of kin," entitled to the grant of the administration under the statutes.

Of the right of
the next of
kin :

Lord Coke describes them to be, "the next of blood who are not attainted of treason, felony, or have any other lawful disability" (c).

Who are the
next of kin
entitled to a
administration
under the
statutes.

It may here be observed, that it is an established principle in the Ecclesiastical Court, that the right to the administration of the effects of an intestate follows the right to the property in them (d). Whence it seems to follow, that all the cases which have decided what persons are next of kin, so as to be entitled to a share of the intestate's personal estate under the Statute of Distribution, are authorities upon the question, as to what parties are next of kin, so as to be entitled to administration under the Statutes of Administration.

Right to ad-
ministration
follows the
right to the
property.

It has been laid down, that the Statute of Distribution must be construed according to the common law (e). Nevertheless, the more modern cases seem to have fully established that its construction, as to the proximity of degrees of kindred at least, shall be according to the rules of the civil law (f).

Construction of
Statute of Dis-
tribution by
modern cases
according to
rules of Civil
Law.

(a) *Ryan v. Ryan*, 2 Phillim. 332.

(b) *Pettifer v. James*, Bunbury, 16. In the goods of Davies, 2 Curt. 628. And as a divorced wife has forfeited all interest in the estate of the deceased, so there is no necessity for citing her before granting administration to the next of kin. See *In the goods of Nares*, 13 P. D. 35. But the Court will not, at any rate without

notice, pass over the widow who has been legally separated from her husband by reason of his cruelty, in granting administration to his estate. In the goods of *Ihler*, L. R. 3 P. & D. 50.

(c) *Hensloe's case*, 9 Co. 39, b.

(d) By Sir John Nicholl, in the goods of *Gill*, 1 Hagg. 342.

(e) *Blackborough v. Davis*, 1 P. Wms. 50.

(f) *Lock v. Lake*, 2 Cas. temp.

Definition of
consanguinity.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descenditum*," the connection or relation of persons descended from the same stock or common ancestor (*g*). The consanguinity is either lineal or collateral.

Lineal consanguinity.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between the Propositus and his father, grandfather, great-grandfather, and so upwards in the direct ascending line, or between the Propositus and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: The father of the Propositus is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore, universally obtains, as well in the civil and canon, as in the common law. This lineal consanguinity, it may be observed, falls strictly within the definition of *vinculum personarum ab eodem stipite descenditum*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor (*h*).

Collateral consanguinity.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such, then, as literally spring from one and the same ancestor who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issue are lineally descended from John Stiles as their common ancestor: and

Lee, 420. 4 Barn. E. L. 543,
Phillimore's edition.

(*g*) 2 Black. Comm. 203.
(*h*) *Ibid*.

Ch. II. § I.] *To whom they should be granted.*

they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos* (i).

It must be carefully remembered, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both are derived from one father: Titius and his first cousin are related; why? because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this: that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by Holy Writ, that there is one couple of ancestors belonging to us all from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other (k).

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, so as to be entitled to administration, conforms, as it has been above observed, to that of the civil law, and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending (l); or, in other words, to take the sum of the degrees in both lines to the common ancestor (m).

Mode of calculating degrees of consanguinity in the collateral line.

(i) 2 Black. Comm. 204.

(k) 2 Black. Comm. 205.

(l) 2 Black. Comm. 207. Toller, 88.

(m) *Ibid.* and Mr. Christian's note to 2 Black. Comm. 207. According to the canon law, the mode of computation is to begin at the common ancestor, and reckon downwards, and in whatsoever

degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. It is obvious, that the degrees by this calculation are fewer than by the mode of the civilians: And Sir J. Jekyll, in Prec. Chanc. 593, and Lord Hardwicke, in 1 Ves. Sen. 335,

The Propositus and his cousin-german are related in the fourth degree—because, following the rule of computation, from the Propositus ascending to his father, is one degree: from him to the common ancestor, the grandfather, two: then, descending from the grandfather to the uncle, three: and from the uncle to the cousin-german, four. Again, the second cousin of the Propositus is related in the sixth degree; because, from the Propositus, ascending to his father is one degree; from his father to his grandfather, two; from his grandfather to his great-grandfather, the common ancestor, three: then, descending, from the great-grandfather to the great-uncle of the Propositus, four; from the great uncle to the great-uncle's son, five; from his great uncle's son to his second cousin, six.—It will be observed, that kindred are found distant from the Propositus by an equal number of degrees, although they are relations to him of very different denominations. Thus, a grand-daughter of the sister, and a daughter of the intestate's aunt (*i.e.* a great-niece and a first cousin), are in equal degree, being each four degrees removed (*n*).

In the further consideration of this mode of computing proximity of kindred, and the rights to administration derived from it, several remarkable distinctions may be observed, with reference to the corresponding rules of the common law, respecting succession to inheritances.

Relations by mother's side equally entitled with those of father's.

1st. Relations by the father's side and the mother's side are in equal degree of kindred; and, therefore, equally entitled to administration: for, in this respect, dignity of blood gives no preference (*o*). Hence it may happen that relations are distant from the intestate by an equal number of

attribute the establishment of the mode of canonists to this circumstance; inasmuch as the nearer they brought the relation, the greater was their trade of dispensations of marriage.

(*n*) *Thomas v. Ketteriche*, 1 Ves. Sen. 333. *Thirt v. Robinson*, cited Ambl. 192. So a first cousin twice

removed is in the same degree as a second cousin; for they are both in the sixth degree of consanguinity: *Silcox v. Bell*, 1 Sim. & Stu. 301. *Lock v. Lake*, 2 Cas. temp. Lee, 421.

(*o*) *Moor v. Barham*, cited in *Blackborough v. Davis*, 1 P. Wms. 53.

degrees, and equally entitled to the administration of his effects, who are no relations at all to each other.

2ndly. The half-blood is admitted to administration as well as the whole (*p*); for they are kindred of the intestate, and have been excluded from the inheritance of land only on feudal reasons: Therefore, the brother of the half-blood shall exclude the uncle of the whole blood (*q*); and the Ordinary *may* grant administration to the sister of the half or the brother of the whole blood, at his discretion (*r*).

Half-blood
not excluded.

3rdly. As younger children must stand in the same degree of kindred as the eldest, primogeniture can give no *right* to preference in the grant of administration (*s*).

Primogeniture
gives no *right*
to preference.

4thly. The right to administration will follow the proximity of kindred, though ascendant: and, therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the administration of the personal effects of the intestate as next of kin, exclusive of all others (*t*). Indeed, anciently, that is, in the reign of Henry I., a surviving father could have taken even the real estate of his deceased child (*u*). But this law of succession was altered soon afterwards; for we find by Glanville, that in the time of King Henry II. the father could not take the real estate of his deceased child, the inheritance being then carried over to the collateral line: and it was subsequently held an inviolable maxim, that an inheritance could not ascend: But this alteration of the law never extended to personal estate (*x*). So with respect to the mother, if a child dies intestate without a wife, child, or father, the mother is entitled to administration (*y*): and before the statute of 1 Jac. II. c. 17, she

The rights of
ascendants:

of the father:

of the mother:

(*p*) Smith v. Tracey, 1 Vent. 323.

(*q*) Collingwood v. Pace, 1 Vent. 424.

(*r*) Brown v. Wood, Aleyn, 36. 2 Black. Comm. 505. But see *post*, p. 363.

(*s*) Warwick v. Greville, 1 Phil. lim. 124; but see *post*, p. 363.

(*t*) Ratcliffe's case, 3 Co. 40, a.

(*u*) Blackborough v. Davis, 1 P. Wms. 50.

(*x*) 1 P. Wms. 51. And now, by stat. 3 & 4 Will. IV. c. 106, s. 6, every lineal ancestor shall be capable of being heir to any of his issue.

(*y*) Ratcliffe's case, 3 Co. 40, a.

grandfather
preferred to
the uncle.

could claim as next of kin the whole personal estate; but by that statute, every brother and sister shall have an equal share with her (2). Again, if a man dies intestate, leaving no nearer relations than a grandfather or grandmother, and an uncle or aunt, the grandfather or grandmother, being in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the third degree (a). So a great-grandmother is equally entitled as an aunt (b).

However, though the Ecclesiastical Law of England acknowledges the rights of ascendants generally, yet it does not recognise them to the extent of the civil law, according to which, ascendants, of whatever degree, shall be preferred before all collaterals, except in the case of brothers and sisters. But our law prefers the next of kin, though collateral, before one, who, though lineal, is more remote (c).

Females
equally en-
titled with
males, at the
discretion of
the Court.

5thly. With respect to the right to administration, those in equal degree are equally entitled, subject to the discretionary election of the Court, whether males or females (d). The preference of males to females, which exists in the succession to inheritances, seems to have arisen entirely from the feudal law; and has never been applied to rights respecting personal estate (e).

Exceptions in
our law to the
rules of
proximity of
blood:

Children of
intestate pre-
ferred to his
parents:

It remains to notice certain exceptions to the rule of computation, above stated, of the proximity of kindred and consequent right to administration.

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree: but in

where the well-known case of the
Duchess of Suffolk, Bro. Admor.
pl. 47, was denied.

(2) See *infra*, Pt. III. Bk. IV. Ch. I.
§ IV.

(a) *Mentney v. Petty*, Prec.
Chanc. 593. *Blackborough v.*
Davis, 1 P. Wms. 41.

(b) *Burton v. Sharp*, cited

in 1 Lord Raym. 686. Lutw.
1055.

(c) 1 P. Wms. 51, by Lord Holt.
Stanley v. Stanley, 1 Atk. 458, by
Lord Hardwicke.

(d) *Brown v. Wood*, Aleyn, 2^o
S. C. Style, 74.

(e) But see *post*, p. 363.

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our law children are allowed the preference (*f*), and so are their lineal descendants to the remotest degree (*g*).

2nd. Where the nearest relations according to the above computation, are a grandfather or grandmother, and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the administration to the exclusion of the former (*h*).

To recapitulate, in the first place the children, and their lineal descendants to the remotest degree: and on failure of children, the parents of the deceased are entitled to the administration: then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins (*i*). A more particular discussion of some parts of the present subject will be found in a subsequent part of this Treatise, where the rights of the next of kin of an intestate, under the Statute of Distributions, are considered (*k*).

If the sole next of kin is a married woman, and renounces, the grant is made to the husband:—for he has an interest, and the grant must follow the interest, and the wife cannot, by renouncing, deprive her husband of his right to the grant (*l*).

Where two parties contest the right to administration before any grant has been made, both are to propound their interests, and to proceed *pari passu*: and this whether the mutual interests are denied, or whether an interest is denied and a Will opposed: nor does the rule vary, whether the asserted next of kin are in the same or different degrees of

Brother to
grandfather.

Recapitula-
tion.

Right of hus-
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of kin who
renounces.

Parties con-
testing the
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before any
grant, must
proceed *pari*
passu.

(*f*) 2 Black. Comm. 504. But by this preference it is not to be understood that they are not considered as perfectly equal in degree of proximity: Withy v. Mangles, 4 Beav. 358. S. C. in Dom. Proc. 10 Cl. & Fin. 215.

(*g*) Carter v. Crawley, Sir T. Raym. 500. Evelyn v. Evelyn,

Ambl. 192.

(*h*) Evelyn v. Evelyn, 3 Atk. 762.

(*i*) 2 Black. Comm. 505.

(*k*) Post, Pt. III. Bk. IV. Ch. I. § IV.

(*l*) Haynes v. Matthews, 1 Sw. & Tr. 460. Wenham v. Wenham, 6 Notes of Cases, 17.

relationship (*m*). In *Waller v. Heseltine* (*n*); the Prerogative Court decided that the question concerning a Will and the question of interest between the Crown and the next of kin, must all go on together.

Where there are several next of kin in equal degree:

Where there are several persons standing in the same degree of kindred to the intestate, the statute, we have seen, gives the Ordinary his election to accept any one or more of such persons (*o*). It remains to inquire by what principles and rules of practice his discretion, in making such election, has been guided in the Ecclesiastical Court.

the Court grants administration to him whom the majority of parties interested desire:

The Court have considered it their first duty to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution: the primary object being the interest of the estate (*p*). But where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of that person, amongst those of the same degree of kindred, to whom the majority of parties interested are desirous of entrusting the estate (*q*). On this principle, in a case as early as 1678 (*r*), it was

(*m*) *Dabbs v. Chisman*, 1 Phillim. 159. It is otherwise when a party is in the possession of the administration. See *post*, p. 378, note (*i*).

(*n*) Cited by Sir John Nicholl in 1 Phillim. 159; reported 1 Phillim. 170.

(*o*) By rule 28 P. R. 1862 (Non-contentious): "Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit or statutory declaration that

notice of such application has been given to such other next of kin."

(*p*) *Warwick v. Greville*, 1 Phil. 125.

(*q*) *Elwes v. Elwes*, 2 Cas. temp. Lee, 573. *Budd v. Silver*, 2 Phillim. 115. However, administration is not always granted to the majority of interests: *Wetdrill v. Wright*, 2 Phil. 248. See also in the goods of *Stainton*, L. R. 2 P. & D. 212.

(*r*) *Cartwright's case*, 1 Freem. 258. See also *Sawbridge v. Hill*, L. R. 2 P. & D. 219.

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decided by the two Chief Justices, the Chief Baron *et alii*, that, where the deceased left four grandchildren, whereof one was of age and the other three minors, the administration should be granted to the mother as guardian to the three *durante minore ætate*, in preference to the grandchild who was of age : because, since the statute (22 & 23 Car. II. c. 10), which entitled them all to distribution, the interest of the three preponderated.

But, although, when the contest for an administration is between two persons in equal degree of the whole blood, the general rule has been to grant it to that person in whom the majority of those entitled to distribution concur ; yet that rule does not hold when the contest is between one of the whole blood and one of the half blood ; for, in that case, the whole blood is preferable in the grant of administration to the half-blood, though the majority of interests concur in the latter, unless material objections can be proved against him of the whole blood (*s*).

Primogeniture, as it has been already observed, gives no right to preference, so as to weigh against the wish of the majority of interests ; yet if things are precisely equal,—if the scale is exactly poised, being the elder brother would incline the balance (*t*).

Again, by the practice of the Court, a son has the preference to a daughter, unless there are material objections to him ; and it has been held not enough to divest him of that preference, to show that he has intermeddled with the effects of the deceased without competent authority (*u*).

whole blood preferred, unless material objections can be proved :

Primogeniture:

Son preferred to daughter :

(*s*) Mercer *v.* Moorland, 2 Cas. temp. Lee, 499. Stratton *v.* Linton, 31 L. J., P. M. & A. 48.

(*t*) Warwick *v.* Greville, 1 Phil. lin. 125. S. P. as to an elder of two sisters, Coppin *v.* Dillon, 4 Hagg. 376.

(*u*) Chittenden *v.* Knight, 2 Cas. temp. Lee, 559. The rule that males are to be preferred to

females is not so stringent as the rule that the grant will follow the majority of interests : Iredale *v.* Ford, 1 Sw. & Tr. 305. Again the former rule may be met by another rule, viz., that the grant will be made *priori petenti* : Cordeux *v.* Trasler, 34 L. J., P. M. & A. 127.

A man used to business preferred :

next of kin also creditor :

next of kin a bankrupt :

husband a bankrupt :

next of kin a lunatic.

The Court prefers a sole to a joint administration :

and never forces a joint administration.

When an administrator is once appointed, another of same degree of kindred cannot come into the administration till the administrator is dead.

Ceteris paribus, a man accustomed to business is preferred by the Court to be administrator (*x*).

The fact of one of several next of kin being also a creditor is rather adverse to, than in favour of, his being preferred in a contest for the administration (*y*).

In case where the administration was contested between two in an equal degree of relationship, one of whom was objectionable, but the other had been twice a bankrupt, the Court granted the administration to the former, and condemned the latter in costs (*z*).

A husband's right to administration to his wife's estate is not such a right as will vest in the trustee under his bankruptcy (*a*).

Where the sole next of kin of an intestate was a lunatic, and her committee renounced, the Court upon the consent of the next of kin of the lunatic being filed, granted administration to a stranger in blood (*b*).

The Court prefers, *ceteris paribus*, a sole to a joint administration, because it is much better for the estate, and more convenient for the claimants on it (*c*) ; and, *à fortiori*, the Court never forces a joint administration upon unwilling parties (*d*).

When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant ; so different in this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*qui prior est tempore potior est jure*," applies in the former but not in the latter

(*x*) *Williams v. Wilkins*, 2 Phillim. 100.

(*y*) *Webb v. Needham*, 1 Add. 494.

(*z*) *Bell v. Timiswood*, 2 Phillim. 22.

(*a*) In the goods of *Turner*, 12 P. D. 18.

(*b*) In the goods of *Hastings*, 4

P. D. 73.

(*c*) *Warwick v. Greville*, 1 Phillim. 126. *Stanley v. Bernes*, 1 Hagg. 222. In the goods of *Nayler*, 2 Robert. 400. *Ante*, p. 350, note (*y*).

(*d*) *Bell v. Timiswood*, 2 Phillim. 22.

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instance (e). But a next of kin who has even renounced may, upon the death of the party appointed administrator, come in and take administration *de bonis non* (f).

Where a person entitled to administration is resident in a foreign country, the Court will expect that due diligence shall be used to give him notice of the application, before it will grant administration to another party. Thus where the intestate died in the department of Oise, in France, leaving a widow resident there, and application was made for administration by the next of kin, the Court held, that service of the decree in the then usual manner on the Royal Exchange was insufficient (g).

If the intestate left personal property, as well in the Colonies as in this country, the grant of administration obtained here will not extend to the Colonies, though the intestate died and was resident here (h). So a defendant who had been arrested in Ireland, by a writ of *ne exeat regno* issued out of Chancery there, for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country (i).

In the case of a foreigner dying intestate within the British dominions, it should seem, that if no question is raised, the Court will grant administration to the person entitled to the effects of the deceased, according to the law of his own country (k). If the legal title be disputed, the question will

Where a party entitled to administration is resident abroad.

Administration of property out of this country.

Administration of the effects of a foreigner.

(e) Toller, 98.

(f) Skeffington v. White, 1 Hag. 700, 702, 703.

(g) Goddard v. Cressonier, 3 Phillim. 637. The same, where the next of kin is resident in the West Indies: Miller v. Washington, 3 Hag. 277. As to the present practice of citations, see post p. 379.

(h) Burn v. Cole, Ambl. 416. Atkins v. Smith, 2 Atk. 63, by Lord Harwicke. But the rights of such an administrator will ex-

tend to the property there, if the deceased was domiciled here: and the judge of probate in the colonies ought to follow the English grant. See ante, p. 302.

(i) Swift v. Swift, 1 Ball & Beat. 326.

(k) In the goods of Beggia, 1 Add. 340. In the goods of the Countess Da Cunha, 1 Hag. 237. Administration of the effects of a deceased, who died domiciled in Scotland, was granted to a party entitled to them according to the

depend on the fact whether the deceased was domiciled within the British dominions, or only a temporary resident there (*l*).

Administra-
tion to a
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ciled out of
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If the intestate was domiciled in a foreign country, or within the king's dominions out of England, and left assets in this country, administration must be taken out here, as well as in the country of domicile (*m*). But if he left no assets in this country, the Court of Probate has no jurisdiction to make any grant of administration in respect of his estate (*n*). If the party applying for administration here has already obtained a grant in the proper Court of the country where the domicile was, it should seem that the Court here, generally speaking, would follow that grant (*o*): But if an original administration be applied for here, in such case, whether the deceased were a British subject, or an alien, since, in either event, the distribution of his personal property is to be regulated according to the law of the country in which he was a domiciled inhabitant at the time of his death (*p*), it appears

Scotch law, on proof of the law by affidavit from a Scotch solicitor: In the goods of Stewart, 1 Curt. 904. See also In the goods of Hill, L. R. 2 P. & D. 89. The regular course seems to be that the ambassador should certify the law of the country he represents: In the goods of Dormoy, 3 Hagg. 767.

(*l*) 1 Add. 342. And see *ante*, p. 302, *et seq.*, and *infra*, Pt. III. Bk. IV. Ch. I. § v. Where a party applies for administration, as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported, without exhibiting to the Court a proper authority from the person so entitled: In the goods of the Elector of Hesse, 1 Hagg. 93.

(*m*) See *ante*, p. 298. *Le Briton*

v. Le Quesne, 2 Cas. temp. Lee, 261. *Attorney-General v. Bouwens*, 4 Mees. & W. 193.

(*n*) In the goods of Tucker, 3 Sw. & Tr. 585. *Evans v. Burrell*, 28 L. J., P. & M. 82. In the goods of Fittock, 32 L. J., P. & M. 157. See also In the goods of Coode, L. R. 1 P. & D. 449.

(*o*) See *ante*, p. 305. *Viesca v. D'Aramburu*, 2 Curt. 277. In the goods of Rogerson, 2 Curt. 656. In the goods of Henderson, 2 Robert. 144. As to whether the Court will grant administration limited to the pendency of a suit in the foreign Court to a person duly appointed by that Court, see In the goods of Morgan, 2 Robert. 415.

(*p*) See *post*, Pt. III. Bk. IV. Ch. I. § v.

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to be a necessary consequence that the grant should be made to the person entitled to the effects of the deceased according to the law of that country (q).

By stat. 24 & 25 Vict. c. 121, s. 4, "Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette, it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul or consular agent of such foreign state, within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul or consular agent shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit."

It may here be remarked, that although it is fully settled

Stat. 24 & 25
Vict. c. 121,
s. 4.

When subjects
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states shall die
in her Majesty's
dominions and
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no person to
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the consuls of
such foreign
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Rights and
liabilities of

(q) See In the goods of Johnston, 4 Hagg. 182. But see also In the goods of Veiga, 3 Sw. & Tr. 13. But administration of the effects of a domiciled American dying in this country, *in itinere*, limited to the purpose of paying his debts, &c., and transmitting the balance to the Treasury of the United States, was refused to the American consul, the Crown opposing the grant, though none of

the next of kin appeared to show cause against it: *Aspinwall v. The Queen's Proctor*, 2 Curt. 241. See In the goods of Wyckoff, 3 Sw. & Tr. 20. The law of this country will not, it should seem, recognise the right of a foreign consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country: 2 Curt. 247. See stat. 24 & 25 Vict. c. 121, s. 4, *supra*.

foreign administrators.

(as there will hereafter be occasion to show) (r), that the right of succession to the personal estate of an intestate is to be regulated by the law of the country in which he was domiciled at the time of his death, yet the administration of the estate must be in the country in which possession of it is taken and held under lawful authority. Thus, by the law of England, the person to whom administration is granted by the Court of Probate is by statute bound to administer the estate, and to pay the debts of the deceased: The letters of administration, under which he acts, direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as his goods will extend, and exhibit a full and true account of his administration: And these duties remain the same, notwithstanding the intestate may have died domiciled elsewhere.—Accordingly, in *Preston v. Lord Melville* (s), the persons named as trustees and executors in the Will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper Ecclesiastical Court there, and afterwards consented to the appointment, by the Court of Session of Scotland, of other persons as trustees and executors in place of those named in the Will, with all the powers that had been thereby given to them: These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability; and it was held by the House of Lords (reversing the decree of the Court of Session), that the personal estate in England must be administered there by the administratrix, by virtue of the letters of administration (t).

(r) *Post*, Pt. III. Bk. IV. Ch. I.
§ v.

(s) 8 Cl. & Fin. 1.

(t) See *Accord. per* Lord Cran-

worth in *Enohin v. Wylie*, 10 H. of L. 19. See also Lord St. Leonards' observations on this case in the *Carron Iron Company v. Mac-*

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Again, with respect to all the property of which the intestate died possessed in the Queen's dominions out of England, the administrator, under the letters granted there, has, it should seem, a right to hold it against an administrator under a grant obtained in this country. Thus in *Currie v. Bircham* (u), the widow of an officer who died intestate in India obtained letters of administration of her husband's effects in the Recorder's Court at Bombay, and remitted the proceeds of the effects in government bills to her agent in England: A creditor of the intestate took out letters of administration to him in this country, and brought an action against the widow's agent for money in his hands, part of such proceeds so remitted: It was held that the wife was entitled to all the effects of which the husband died possessed in India, by virtue of the letters of administration granted to her in that country, and that therefore no action lay against her agent at the suit of the plaintiff, under the letters he had obtained in the Prerogative Court here (x). However, in *Hervey v. Fitzpatrick* (y), it was held by Wood, V.-C., that where the foreign administrator remits a part of the assets to England to be sold and the proceeds to be carried to the account of the intestate's estate, and comes himself to this country, he may be sued in a Court of Equity here by a next of kin of the deceased, who has taken out administration here, in respect of those assets: and that the Court has a right to deal with them, and to appoint a receiver, if there is danger of their being taken out of the jurisdiction.

If a bastard, who, as *nullius filius* has no kindred, or any other person having no kindred, die intestate, and without wife or child, it has formerly been holden, that the Ordinary

Administration to a bastard, or other person without kindred.

laren, 5 H. of L. 456. *Stirling Maxwell v. Cartwright*, 9 C. D. 173; 11 C. D. 522. *Eames v. Hacon*, 16 C. D. 407; 18 C. D. 347. *Ewing v. Orr-Ewing*, 9 App. Cas. 34; 10 App. Cas. 453. But the principal administrator, that is to say, the administrator in the country of the domicil, is entitled

to call on all limited administrators to pay over the net surplus. See *Eames v. Hacon* (*ubi sup.*).

(u) 1 Dowl. & Ry. 35.

(x) See also *Jauncey v. Sealey*, 1 Vern. 397. *Story's Conf. of Laws*, Ch. xiii. s. 518. *Ante*, p. 296, *et seq.*

(y) *Kay*, 421.

could seize his goods, and dispose of them to pious uses; but it is now settled that the king is entitled to them as *ultimus heres* (z), not in a fiduciary character but beneficially (a); subject, nevertheless, to the debts of the intestate (b). Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the Crown, with a reservation, as it is said, of a tenth, or other small proportion of the property, and then the Court of course grants to such appointee the administration (c). It has indeed been asserted, that such letters patent are merely in the nature of a recommendation; and that though it be usual for the Court to admit such patentee, yet it is rather out of respect to the king, than strictly of right (d). But if the Court chose to grant administration to any other person, the right of the Crown would remain the same. The administrator, whoever he might be, would be a trustee for the Crown (e).

Where a bastard or other person having no kindred dies intestate, leaving a widow but no children, the widow is not entitled to the whole of his personal estate, but to one moiety only, and the Crown is entitled to the other (f).

Where bastard without relations disposes by Will of part only of his property.

Where a bastard having no relations makes a Will disposing of a part only of his or her property, the Crown has a

(z) *Jones v. Goodchild*, 3 P. Wms. 33. *Rutherford v. Maule*, 4 Hagg. 213. *Dyke v. Walford*, 5 Moo. P. C. 434. In this last case it was held that the right of administration to the goods of a bastard, who died intestate and unmarried, in the county of Lancaster, belonged to the Queen in right of her Duchy of Lancaster and not in right of her Crown.

(a) *Kane v. Reynolds*, 4 De G. M. & G. 571, by Lord Cranworth.

(b) *Megit v. Johnson*, 2 Dougl. 548, by Lord Mansfield.

(c) *Stote v. Tyndall*, 2 Cas. temp. Lee, 394.

(d) *Manning v. Knapp*, 1 Salk. 37.

(e) 5 Moo. P. C. 495. Where a

case is not within the Statutes of Administration, the Court, in the exercise of its discretion, usually grants the administration to the interest. See *post*, Ch. III. § 1. p. 400.

(f) *Cave v. Roberts*, 8 Sim. 214. But it should be noticed that in all cases where an intestate dies after 1st September, 1890, the provisions of the Intestates Estates Act, 1890, 53 & 54 Vict. c. 29, apply, and the widow in the case of estates under £500 takes the whole to the exclusion of the Crown and in the case of estates over £500 a charge for £500 in addition to her share of the residuum.

right to a grant, save and except, or to a *caterorum* grant, but not to a general grant of administration, and the legatees have a right to a grant of administration with the Will annexed limited to the property disposed of by the Will (g).

By stat. 39 & 40 Vict. c. 18, The Treasury Solicitor Act, 1876 [which by sect. 9 repeals the former statute, 15 Vict. c. 8], the Treasury Solicitor is constituted a corporation sole with certain powers and liabilities (sect. 1).

Stat. 39 & 40
Vict. c. 18,
s. 1.

Where the Crown becomes entitled to the personal estate of an intestate, and the Court has power to grant administration to a nominee of the Crown, and where the Crown nominates for that purpose the Treasury Solicitor, the Court may grant administration for the use of the Crown to the Treasury Solicitor (by his official name) and his successors, or to some person nominated by the Treasury Solicitor (sect. 2).

Administration where Crown entitled to personal estate of intestate.

The administration, when granted to the Treasury Solicitor, and the office of administration under such grant, and all the estate, rights, duties, and liabilities of such administrator vest in and are imposed on the Treasury Solicitor for the time being without any further grant of administration (*Ib.*).

The Treasury Solicitor may be nominated as administrator either in any particular case or class of cases, or in all cases, and such nomination may be limited as to Her Majesty may seem fit, and the Treasury Solicitor may be authorised to nominate some other person to take out administration in any particular case or class of cases.

The Treasury Solicitor notwithstanding that he does not give the bond which, if such administration were granted to him as a private individual, he would be required by law to give, is subject as regards the administration to the liabilities and duties imposed by such bond (*Ib.*).

Section 4 deals with the disposal of money and property received under an administration or forfeiture, and of unclaimed grants.

Sect. 4.

Section 5 provides for the making of rules by the Treasury.

sect. 5.

(g) In the goods of Rhoades, L. R. 1 P. & D. 119.

sect. 6.

Section 6 applies the Act to previous administrations, &c.

sect. 9 (1).

Section 9 (1) provides for the re-enactment of sect. 2 of stat. 15 & 16 Vict. c. 3 (repealed as above stated) viz., that "where the administration of the personal estate of any deceased person has been granted to the Solicitor for the affairs of Her Majesty's Duchy of Lancaster, for the use of Her Majesty, that solicitor shall, notwithstanding that he does not give the bond which, if such administration had been granted to him as a private individual, he would be required by law to give, be subject, as regards the administration, to the liabilities and duties imposed by such bond."

Where a person died in Cornwall intestate without known relations, the Court granted letters of administration of his estate for the use of H.R.H. the Prince of Wales as Duke of Cornwall, but without prejudice to the rights of the Crown (*h*).

Intestates' Estates Act, 1884, 47 & 48 Vict. c. 71, s. 2.

By the Intestates Estates Act, 1884, "where the administration of the personal estate of any deceased person is granted to a nominee of Her Majesty (whether the Treasury Solicitor or a person nominated by the Treasury Solicitor, or any other person) any action or proceeding by or against such nominee for the recovery of the personal estate of such deceased person, or any share thereof, shall be of the same character, and be brought, instituted, and carried on in the same manner, and be subject to the same rules of law and equity (including the rules of limitation under the Statutes of Limitation or otherwise) in all respects as if the administration had been granted to such nominee as one of the next of kin of such deceased person" (sect. 2).

sect. 3.

Section 3 enacts that "after the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted, and a petition of right shall not be presented in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject."

(*h*) *Solicitor of the Duchy of Cornwall v. Canning*, 5 P. D. 114.

Section 4 enacts that "from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditaments, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the Will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

Section 5 gives to the Court a power of sale of the interest of the Crown in any hereditament corporeal or incorporeal, and directs that the proceeds of such sale shall be paid, invested, and disposed of in manner provided by sect. 4 of the Treasury Solicitor Act, 1876.

It further applies the provisions of sect. 1 of the Trustee Act, 1850, to such sale. 15 & 16 Vict. c. 55, s. 1.

Section 6 gives to the Crown power to waive its right to the real estate of an intestate in certain cases.

Section 7 defines an intestacy for the purposes of the Act as "where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person was legal or equitable, is, owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of, such person shall be deemed to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of."

Section 8 applies the Act to the Duchy of Lancaster.

sect. 8.

Section 9 applies the Act to Ireland.

sect. 9.

In the case of a felon convict, and of a *felo de se*, the law of forfeiture being abolished by stat. 33 & 34 Vict. c. 23, s. 1, administration is now no longer granted as formerly to a nominee of the Crown, but follows the ordinary course of the law of succession *ab intestato*.

Administration to a felon.

It has always been considered, both in the Common Law and Spiritual Courts, that the object of the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5) is to

Next of kin excluded from the administration, when they have no interest.

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give the management of the property to the person who has the beneficial interest in it (k). And the inclination has been so strong to effectuate this object, by granting the administration to the interest that, in some instances, not only the practice of the Ecclesiastical Court, but the decisions of the Judges Delegate, have not scrupled to disregard the express words of the statute (l). Thus in *Bridges v. The Duke of Newcastle* (Delegates, 1712), Lord Hollis died intestate, and Bridges claimed administration as next of kin: The effects were vested by Act of Parliament in the Duke of Newcastle, to pay the debts of the deceased: The Judge of the Prerogative Court (Sir Charles Hedges) and afterwards the Delegates, held that the next of kin was excluded, on the ground that he had no interest, and granted administration to the Duke of Newcastle (m). So in *Young v. Pierce* (n), administration was refused by the Prerogative and the Delegates to a next of kin, on the ground that she had released all her interest, and the letters were granted to the party beneficially entitled to the personal estate (o). Another strong instance will be found in the next section, with respect to administration *cum testamento annexo*: in granting which, it has been established by the decisions both of common lawyers and civilians, contrary to the words of the Act, that the next of kin is to be excluded from the administration when there is a residuary legatee who desires it.

If the next of kin die before administration granted, his representative is entitled to it:

Again, the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5) provide that the Ordinary shall grant administration to the next of kin, or the widow, or to both: and therefore these parties have a statutory right to the administration. But the obligation of the statutes has, in

(k) *Wetdrill v. Wright*, 2 Phillim. 248.

(l) See the judgment of Lord Cottenham, in *Withy v. Margles*, 10 Cl. & Fin. 248: *Accord*.

(m) Cited by the Court in *West v. Willby*, 3 Phillim. 381.

(n) 1 Freem. 493.

(o) This was a case of administration *de bonis non*: but it will appear in a subsequent section, that, with respect to the obligation of the statute, there is no difference between an administration *de bonis non* and an original administration.

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several adjudged cases, as well as in practice, been considered to extend only to such persons as are next of kin at the time of the intestate's death (p); and therefore the Court is not bound to grant administration to one who is not entitled to a beneficial interest in the effects, although by the death of intermediate persons, he may have become next of kin at the time the grant is required. Accordingly it was the established practice and course of the Prerogative Office, that if all those who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to the administration, whether original or *de bonis non*: with this limitation, however, in both cases, that a person originally in distribution is preferred to the representative of the next of kin (q).

But it is no defence to an action brought by such representative, as administrator to the original intestate, against a debtor to his estate, that the defendant paid the debt in question to the next of kin, who died without taking out letters of administration (r).

There is a distinction between a person appointed executor, and one entitled to the administration as next of kin, with respect to the obligatory consequences of administering the goods of the deceased: An executor, it has been shown, after an act of administration, cannot refuse to accept the executorship, and take probate (s): but although a next of kin may have intermeddled with the effects, and made himself liable as executor *de son tort*, he cannot be compelled by the Court to take upon himself the office of administrator (t).

(p) *Savage v. Blythe*, 2 Hagg. Appendix, 150. *Almes v. Almes*, *ibid.* 155; and see the observations of the learned reporter, *ibid.* p. 156.

(q) 2 Hagg. Appendix, 157.

(r) *Mitchell v. Moorman*, 1 Young & Jerv. 21; *Mitchell v. Holmes*, L. R. 8 Ex. 119: and it shall make no difference, though

the grant of administration to the plaintiff be, in its terms, of the goods, &c., "*left unadministered*" by the next of kin: *Mitchell v. Moorman*, *ubi sup.*

(s) *Ante*, p. 227.

(t) *Ackerley v. Oldham*, 1 Philim. 248. *Ackerley v. Parkinson*, 3 M. & S. 411. In the goods of Fell, 2 Sw. & Tr. 126.

But payment to the next of kin is no answer to an action by his representative as administrator to the original intestate.

A next of kin cannot be compelled to take out administration, though he has intermeddled with the effects.

Administra-
tion granted to
the attorney of
the next of kin.

Administration may be granted to the attorney of all the next of kin, provided they reside out of the country; and if the effects are under twenty pounds, such administration may be granted whether they are so resident or not (*u*). By rule 32, P. R. 1862 (Non-contentious), "In the case of a person residing out of England, administration, or administration with the Will annexed, may be granted to his attorney acting under a power of attorney." But where a person solely entitled to the grant is resident in this country, and able to take it himself, the Court will decline to decree it to his attorney, for his use and benefit (*x*).

On one occasion the Court granted, to the agent of the Elector of Hesse, an administration limited to substantiate proceedings in Chancery respecting a debt due to the late Elector; but declined to extend the administration to the receipt of the debt, without a power of attorney from the proper authorities (*y*).

Where letters of administration are granted to persons under a power of attorney from the party entitled to the representation, the letters express that they are granted "for the use and benefit" of the latter (*z*). But these words do not exclude the claim of other persons to share in the personal estate (*a*). It was, indeed, held, in the case of *De la Viesca v. Lubbock* (*b*), that where administration has been

(*u*) Toller, 108. As to what shall constitute a proper authority to apply for the grant, as the attorney of the party entitled to it, see *Lucas v. Lucas*, 3 Cas. temp. Lee, 578. In the goods of Reitz, 3 Hagg. 766. In the goods of Elderton, 4 Hagg. 210.

(*x*) In the goods of Burch, 2 Sw. & Tr. 139.

(*y*) In the goods of the Elector of Hesse, 1 Hagg. 93: see also In the goods of Beggia, 3 Add. 340.

(*z*) The form of such letters will be found at full length in 10 Sim.

629. 2 Hare, 537, note (*a*). See also In the goods of Cassidy, 4 Hagg. 360. *Post*, p. 407.

(*a*) *Anstruther v. Chalmers*, 2 Sim. 5.

(*b*) 10 Sim. 629. The case of *De la Viesca v. Lubbock* was approved by Jessel, M.R., in *Eames v. Hacon*, 18 C. D. 347, 352, in the argument of which case, *Chambers v. Bicknell*, and *Att.-Gen. v. Kohler* (*ubi infra*), were cited, but, as pointed out by Jessel, M.R., in his judgment, it does not follow because such an

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granted to the attorney of a person abroad for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country; for that as the letters were expressly granted to the administrator as the attorney of the party abroad, he might safely pay over to that party the moneys received under the authority of the letters. However, in the subsequent case of *Chambers v. Bicknell* (c), it was held that such an administrator is liable to be sued, in respect of the estate of the intestate, by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right (d).

The general rule is, that where a person is authorized by a simple power of attorney to take out administration, the Court ought to decree him such administration as it would have granted to the person who conferred the power, if he had applied for it himself (e).

If the attorney be resident out of the jurisdiction, the sureties to the bond must be resident within the kingdom (f).

If none of the next of kin will take out administration a creditor may, by custom, do it (g): on the single ground

Administration granted to a creditor:

administrator is liable to be sued by the next of kin that he cannot, when he has not been sued, hand over the money to the person for whose use and benefit the letters were granted. The two propositions are not correlative.

(c) 2 Hare, 536.

(d) See also *Accord. Re Dewell, Edgar v. Reynolds*, 4 Drew. 269. *Attorney-General v. Kohler*, 9 H. of L. 654.

(e) In the goods of Goldsborough, 1 Sw. & Tr. 295.

(f) In the goods of Leeson, 1 Sw. & Tr. 463. But see In the goods of Reed, 3 Sw. & Tr. 439, in which case the Court accepted

sureties resident in Jersey where the person to whom a limited grant of administration was made was resident without the jurisdiction, and was unable to procure justifying sureties within the jurisdiction. See also In the goods of Ballingall, *ib.* 441. *Post*, Pt. I., Bk. v. Ch. iv.

(g) 2 Black. Comm. 505. He has no right to the administration except by the practice of the Court. He is the appointee of the Court: And if circumstances showed that the creditor was not a proper person, *non constat* that the Court might not appoint another: *Menzies v. Pulbrook*, 2 Curt. 850.

that he cannot be paid his debt until representation to the deceased is made (*h*); and therefore administration is only granted to him, failing every other representative (*i*). So letters of administration may be granted to the executor of a creditor (*k*).

ev. a though
his right of
action be
statute barred:

bond required
from creditor:

now required
in all cases:

citation by
creditor of next
of kin:

It was decided that a creditor is entitled to a grant of administration, although his right of action is barred by the Statute of Limitations, but the Court made it a condition that he should give a bond to distribute the estate rateably and without preference of his own debt (*l*): and it is now the practice that a creditor on taking out administration must in all cases, whether other creditors are present or not to make objection, enter into a bond conditional to administer the estate rateably amongst the creditors of the deceased (*m*).

The necessary course is, when a creditor applies for administration, to issue a citation for the next of kin in particular, and all others in general, to accept or refuse letters of administration, or show cause why administration should not be granted to such creditor (*n*). In point of practice it is not uncommon, upon a decree issuing to show cause why administration should not be committed to A. B., a creditor, to substitute C. D., another creditor, on the day assigned for the appearance of the parties interested, and to

(*h*) *Elme v. Da Costa*, 1 Phillim. 177.

(*i*) *Webb v. Needham*, 1 Add. 441. A creditor cannot deny an interest or oppose a Will: *Dabbs v. Chisman*, 1 Phillim. 159. *Elme v. Da Costa*, 1 Phillim. 177. *Menzies v. Pulbrook*, 2 Curt. 845. *Ante*, p. 280, *post*, p. 382.

(*k*) *Jones v. Beytagh*, 3 Phillim. 635. The husband of a woman, who before marriage has partly administered as a creditor, on her death, is not entitled in his own right as creditor, but only as representative of his wife. In the

goods of *Risdon*, L. R. 1 P. & D. 637.

(*l*) *Coombs v. Coombs*, L. R. 1 P. & D. 288.

(*m*) In the goods of *Brackenbury*, 2 P. D. 272.

(*n*) Whenever a party has a right to the administration, the Court always requires that he should be cited or consent: In the goods of *Barker*, 1 Curt. 592. A creditor may cite the next of kin although his right of action is barred by the Statute of Limitations. In the goods of *Coombs* L. R. 1 P. & D. 193.

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suffr administration to pass to C. D., though not the person in whose name the decree originally went (o). The next of kin may appear to the citation, and will then be preferred to the creditor; but if the next of kin has unduly delayed to take out administration (as where six months elapse from the death of the intestate), the creditor will be allowed his costs (p). If there are no next of kin, as in the case of an intestate bastard, notice of the application for letters of administration must be given to Her Majesty's Procurator General (q).

Citations must be served personally, when that can be done, by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do. If a citation cannot be served personally, it must be served by insertion of the same, or of an abstract settled and signed by one of the Registrars of the Court as an advertisement in such morning and evening London newspapers and such local newspapers and at such intervals as the Judge or Registrar may direct (r).

The Court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed upon (s).

Before granting letters of administration to a creditor, the Court always requires an affidavit as to the amount of the property to be administered: unless where there has been a personal service of the usual citation on the parties entitled to the administration in the first instance (t). An affidavit

citation must
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served if
possible:

if not possible,
by advertisement
in news-
papers:

one creditor
preferred to
the rest upon
terms:

affidavit of the
amount of pro-
perty, &c.:

(o) Talbot v. Andrews, 1 Hag. 607. Andrews v. Murphy, 30 L. J., P. & M. 37.

(p) Cole v. Reu, 2 Phillim. 428. See Jones v. Beytagh, 3 Phillim. 635.

(q) See rule 73, P. R. 1862 (Non-Contentious).

(r) Rules 69 and 70, P. R. 1862 (Non-Contentious).

(s) Harrison v. All persons in general, 2 Phillim. 249. See as to

the preference of one creditor to another, by reason of the superior nature, or larger amount of the debt, Kearney v. Whitaker, 2 Cas. temp. Lee, 324. Carpenter v. Shelford, *ibid.* 502. As to the bond to be entered into, see in the goods of Brackenbury, 2 P. D. 272, ante, p. 378.

(t) Martineau v. Redc, 2 Add. 455. Briggs v. Roope, 29 L. J., P. & M. 98.

is also necessary of the amount of the debt, and that the creditor has no other security (*u*); and also of the time the debt became due, in order that it may be seen that the debt is not barred by the Statute of Limitations (*x*).

creditor a
mortgagee :

The Court will grant administration to a bond creditor, who has also a mortgage on the leasehold property: but if the grant were prayed by a mortgagee of real property, there might be a reason why the administration should not pass to him, because it would give him a priority, and exclude simple contract creditors (*y*).

who is not to
be considered
a creditor :

A person who was joint assignee of the estate of a bankrupt with the deceased, out of which the latter had applied a sum of money to his own use, for which he had not accounted at the time of his death, is not a creditor to the estate of the deceased so as to be entitled to pray administration to him (*z*).

On one occasion (*a*) where a partner died leaving the partnership accounts unsettled, an eminent civilian (*b*), before whom a case was laid by the direction of Sir John Leach, V.-C., gave his opinion that a person to whom one of the surviving partners had assigned his share of the profits of the partnership had not such an interest in the effects of the deceased partner as would entitle him to be considered a creditor, and in that character to cite the next of kin to accept or refuse administration of his effects: but that the Ecclesiastical Court would grant a limited administration to a person nominated by him, for the purpose of substantiating proceedings in Chancery, on the refusal of the next of kin after citation, and upon showing the necessity for such a representation.

creditor who
has bought up
debt after

It is the established practice of the Court of Probate to refuse

(*u*) *Aitkin v. Ford*, 3 Hagg. 193.

(*x*) *Rawlinson v. Burnell*, 3 Sw. & Tr. 479.

(*y*) *Roxburgh v. Lambert*, 2 Hagg. 557. But see now stat. 3 & 4 W. 4, c. 104. *Post*, Pt. IV.

Bk. I. Ch. II. § 1.

(*z*) *Snape v. Webb*, 2 Cas. temp. Lee, 411.

(*a*) *Cawthorn v. Chalie*, 2 Sim. & Stu. 129.

(*b*) *Dr. Jenner*.

to grant administration as creditor to a person who has bought up a debt after the death of the deceased (c).

death of debtor not entitled to administration as creditor :

But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased, who has assigned it, by way of mortgage or otherwise, to the parties seeking the grant (d).

It has been held, that a surety who, after the death of the principal, pays off the debt, is entitled to be regarded as a creditor of the estate of the deceased, so as to be entitled to pray administration to him (e).

secus, as to surety who has paid off debt after death of principal :

In the case of *Aitkin v. Ford* (f), administration, as to a creditor, was decreed to the mother of an intestate, who had been advanced by her ; the father, though alive, having been divorced in the Commissary Court of Scotland, and married again. In *Hudleston v. Hudleston* (g), administration to the effects of a wife who had lived with her husband until her death, was granted to an antenuptial creditor of the wife (h).

When a creditor administrator has been duly appointed,

next of kin cannot oust a creditor

(c) *Debit v. Delerieleuse*, 2 Sw. & Tr. 131. In the goods of Coles, 3 Sw. & Tr. 181. S. C. *nomine* *Macmin v. Coles*, 33 L. J., P. M. & A. 175. *Day v. Thompson*, 3 Sw. & Tr. 169. *Downward v. Dickinson*, 3 Sw. & Tr. 564. But where a creditor who had obtained administration of the estate of an intestate died a bankrupt, without having fully administered and leaving the debt due to himself still unsatisfied, and after his death his trustee in Bankruptcy assigned the unsatisfied debt due to his estate from the intestate's estate to one of his creditors ; the Court made a grant of administration *de bonis non* to such assignee limited to the interest in the intestate's estate which had been

assigned. In the goods of *Burdett*, 1 P. D. 427. As to administration being granted to an undertaker as a creditor for funeral expenses, see *Newcome v. Beloe*, L. R. 1 P. & D. 314.

(d) In the goods of *Godfrey*, 2 Sw. & Tr. 133 ; In the goods of *Coles*, 3 Sw. & Tr. 181. *Downward v. Dickinson*, *ubi supra* : nor with a grant to the assignee of a creditor where he is assignee in Bankruptcy, *ibid*.

(e) *Williams v. Jukes*, 34 L. J., P. & M. 60.

(f) 3 Hagg. 193.

(g) 2 Robert. 424.

(h) A decree had been personally served on the husband, but no appearance was given.

administrator during his life :

the next of kin cannot, during his lifetime, take the administration from him : but upon his death they may come in, and claim administration *de bonis non* (i).

a creditor in possession of administration may oppose an interest or contest a Will.

Although, before administration granted, a creditor cannot deny an interest or oppose a Will, yet, when he has obtained administration, he has a right to maintain it against the executor or the next of kin ; and it is not to be revoked on mere suggestion (k). And where administration has been granted to a creditor, and a Will is afterwards produced, he is entitled to contest it in the same manner that the next of kin might have done, without being subject to costs (l).

When administration may be granted to a person without interest :

For want as well of creditors, as of next of kin, desirous to take out administration, the Court may grant it to any person at its discretion (m). In a case where the brother and only next of kin renounced, the Court granted administration to the nephew, although he had no interest (n). Or the Court may, *ex officio*, grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the

letters *ad colligendum*.

(i) *Skeffington v. White*, 1 Hagg. 702, 703.

(k) *Elme v. Da Costa*, 1 Phillim. 173. *Menzies v. Pulbrook*, 2 Curt. 851. *Ante*, p. 280. And he is not bound to bring in the administration till an admissible allegation has been brought in, either propounding a Will, or propounding an interest : *Dabbs v. Chisman*, 1 Phillim. 159, 160.

(l) *Norman v. Bourne*, 1 Phillim. 160, note (c) to *Dabbs v. Chisman*, 2 Curt. 851. *Ante*, p. 280, note (l).

(m) See the judgment of Sir H. Jenner Fust, 1 Robert. 274, 275. In the goods of Chanter, *Davis v. Chanter*, 14 Sim. 212. In a case where the widow and all the next of kin and persons entitled in distribution, having been cited, did not appear, the Court made a

general grant of administration to the receiver. In the goods of Mayer, L. R. 3 P. & D. 39. Where the sole next of kin of an intestate was a lunatic, her committee having renounced, a stranger in blood applied for a grant of administration. The Court, upon the consent of the next of kin of the lunatic being filed, ordered the grant to be made, the Master in Lunacy and the next of kin of the lunatic approving of the application. In the goods of Hastings, 4 P. D. 73. And see stat. 20 & 21 Vict. c. 77, s. 73, *post*, p. 384.

(n) In the goods of Keane, 1 Hagg. 692. See also In the goods of Blagrove, 2 Hagg. 83. In the goods of Johnson, 2 Sw. & Tr. 568. But see In the goods of Allen, 3 Sw. & Tr. 559.

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deceased. In a case, where a sole next of kin refused to take administration, the Court decreed letters of administration to a person who had been her agent, limited "to the collection of all the personal property of the deceased, and giving discharges for the debts which might have been due to the estate on the payment of the same, and doing what further might be necessary for the preservation of the property aforesaid, and to the safe keeping of the same, to abide the directions of the Court" (o). So, in a subsequent case (p), the Court, under special circumstances, made a grant to a creditor *ad colligendum bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made. But the Court refused to include in the grant a power to dispose of the lease and good-will of the business, or a power to carry on the business (q). Or the Court may take the goods of the deceased into its own hands, to pay the debts of the deceased in such order as an executor or administrator ought to pay them; but he, or the stranger who has letters *ad colligendum*, cannot sell them without making themselves executors of their own wrong: The Court has only an authority, and no such power itself, and therefore it cannot give that power to any other (r).

The power of the Court in making grants of administration, and in deciding to whom they should be granted, has been much enlarged by the 73rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

(o) In the goods of Radnall, 2 Add. 232. Where it is for the benefit of the absent or unknown next of kin the Court will direct an administrator *ad colligenda bona* to dispose of the property or of any portion of it by sale. In the goods of Schwerdtfeger, 1 P. D. 424.

(p) In the goods of Clarkington,

2 Sw. & Tr. 380. In the goods of Ashley, 15 P. D. 120.

(q) See also in the goods of Wyckhoff, 3 Sw. & Tr. 20, where a similar grant was made under the 73rd section of the Court of Probate Act, 1857, *infra*.

(r) 11 Vin. Abr. 87, Exors. (K.) pl. 19.

20 & 21 Vict.
c. 77, s. 73.

where a person shall die intestate or without an executor willing and competent to take probate :

or where the executor is resident out of the United Kingdom :

if it shall appear to be necessary, the Court may appoint a person administrator who would not be otherwise entitled to the grant :

on giving security, and limited as the Court shall think fit.

It is thereby enacted, that "where a person has died or shall die wholly intestate as to his personal estate, or leaving a Will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof; but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit" (s).

(s) The Court will not make a grant under this section, unless there are special circumstances to justify it : In the goods of White, Sw. & Tr. 457. It cannot pass over an executor by reason only of his bad character: he must also be resident out of the United Kingdom. In the goods of Samson, L. R. 3 P. & D. 48. In order to satisfy the Court that it is "necessary and convenient" that the extraordinary power given by the section should be used by the Court, a general statement that "it is necessary for the preservation of the personal estate and effects of the deceased that the

grant should be made" is not sufficient : In the goods of Cooke, 1 Sw. & Tr. 267. In the goods of Bateman, L. R. 2 P. & D. 242. In the following cases, where the Court has thought that the circumstances have warranted such a grant, it has been made : i. To a creditor. In the goods of Fraser, L. R. 1 P. & D. 327. In the goods of Farrands, 1 P. D. 439. In the goods of Wensley, 7 P. D. 13. ii. To a trustee of the marriage settlement of the sole next of kin. In the goods of Maychell, 4 P. D. 74. iii. To the trustee appointed by the will. In the goods of Cosnahan, L. R. 1

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By rule 31, P. R. (Non-contentious), "whenever the Court, under sect. 73, appoints an administrator other than the

Rule 31, P. R.
(Non-contentious.)

P. & D. 183. In the goods of Stewart, 3 P. & D. 244. iv. To the trustee in bankruptcy of sole next of kin. In the goods of Turner, 12 P. D. 18. v. To the nominee of a married woman, on the objection by her husband to her taking probate or administration. In the goods of Warren, L. R. 1 P. & D. 538; Clerke v. Clerke, 6 P. D. 103. vi. To the nominee of a married woman, residuary legatee, without notice to husband. In the goods of Pine, L. R. 1 P. & D. 388. vii. To the guardians of minors. In the goods of Hagger, 3 Sw. & Tr. 65. In the goods of Burgess, 4 Sw. & Tr. 188. In the goods of See, 4 P. D. 86. In the goods of Batterbee, 14 P. D. 39. viii. To a residuary legatee test. annex. In the goods of Sawtell, 2 Sw. & Tr. 448. ix. To the executor under a foreign Will. In the goods of Earl, L. R. 1 P. & D. 450. x. To a sister of the intestate; limited until next of kin should apply for administration. In the goods of Cholwill, L. R. 1 P. & D. 192. xi. To a sister of the intestate; passing over the mother who was willing to renounce. In the goods of Llanwarne, L. R. 1 P. & D. 306. xii. To a sister of the intestate; without taking out personal representation to the father, who also had died intestate. In the goods of Peck, 2 Sw. & Tr. 506. xiii. To the father in law of the sole next of kin in Australia. In the goods of Jones, 1 Sw. & Tr. 13. xiv. To a mother; without requiring her to take out administration to the father. In the goods of Smith, 2 Sw. & Tr. 508.

xv. To the step mother; for the use and benefit of the sole next of kin, a lunatic without committee. In the goods of Burrell, 1 Sw. & Tr. 64. xvi. To a cousin; (limited to carry out certain directions contained in a letter). In the goods of Drinkwater, 2 Sw. & Tr. 611. xvii. To a cousin; for the use and benefit of an aged aunt and uncle, the only persons entitled to distribution. In the goods of Roberts, 1 Sw. & Tr. 64. xviii. To the guardians of the poor; limited during the lunacy of the sole next of kin, a pauper lunatic. In the goods of Findlay, 3 Sw. & Tr. 265. In the goods of Eccles, 15 P. D. 1. xix. To the attorney in England of the next of kin abroad; it being unknown when he would return. In the goods of Escot, 4 Sw. & Tr. 186. xx. To the next of kin and to a person entitled in distribution—jointly; there being special circumstances rendering a joint grant convenient. In the goods of Grundy, L. R. 1 P. & D. 459. xxi. To a stranger; no next of kin or creditor being willing, or able, to take the grant. In the goods of Bateman, L. R. 2 P. & D. 242. xxii. To a stranger; there being doubt as to the legitimacy of the sole next of kin. In the goods of Hopkins, L. R. 3 P. & D. 235. xxiii. To a person applying in pursuance of an agreement to divide the estate; where doubts had arisen as to the legitimacy of the person claiming to be next of kin. In the goods of Minshull, 14 P. D. 151. xxiv. To the partner of one of the executors of the Will who was mentioned by name in the Will

person who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration and in the administration bond."

Citation or consent of party having a prior right requisite before administration granted to another.

In concluding this subject, it may be expedient to advert to an established rule of the Ecclesiastical Court, *viz.*, that wherever a party has a prior right to administer, the Court requires that he should be cited or consent, before it will grant administration to any other person. And the rule will not be relaxed, notwithstanding the party who has the right has no interest in the property in respect of which the grant of administration is sought (*t*). But in cases where the Court has a discretion, *viz.*, in cases where the party entitled in priority is so entitled by the practice of

and was therein requested to act for such executor if he were absent at the time of the testator's death. In the goods of Taylor [1892], P. 90. Generally the Court will not grant administration under this section to a person entitled to a grant in another character, *e.g.*, as a creditor: In the goods of Fairweather, 2 Sw. & Tr. 588. Nor to the nominee of the person entitled to the grant. *Teague v. Wharton*, L. R. 2 P. & D. 360. In the goods of Hale, L. R. 3 P. & D. 207. But in *Farrell v. Brownbill*, 3 Sw. & Tr. 467, the Court granted administration under this section, with the consent of all parties interested, to their nominee, who took no interest in the property himself. See also In the goods of Clayton, 11 P. D. 76. But see In the goods of Richardson, L. R. 2 P. & D. 244, in which it was held that the consent of all persons interested is not sufficient ground for departing from the general rules as to grants. The section is

wholly inapplicable where there is no absence of persons entitled to administration and no insolvency: It would then be a mere arbitrary selection on the part of the Court: *Haynes v. Matthews*, 1 Sw. & Tr. 460. The Court will not exercise the power conferred on it by the above section by passing over a person entitled to a grant of administration in favour of a creditor when the fact of the insolvency of the intestate is disputed: *Hawke v. Wedderburne*, L. R. 1 P. & D. 594: unless there is no next of kin competent to take administration: In the goods of Farrands, 1 P. D. 439.

(*t*) In the goods of Barker, 1 Curt. 592. In the goods of Currey, 5 Notes of Cas. 54. When the next of kin is of unsound mind, the practice is that his next of kin must also be cited, in order that they may take administration for his use and benefit if they think proper: *Windeatt v. Sharland*, L. R. 2 P. & D. 217.

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the Court, and not by statute, the Court will sometimes dispense with the citation or consent of the party having the prior claim (*u*).

SECTION II.

Who are incapable of being Administrators.

A widow, or next of kin, who would otherwise be entitled, may be incapable of the office of administrator on account of some legal disqualification.

Widow or next of kin may be incapable of office of administrator.

It will be shown in a subsequent part of this Treatise, to whom, upon such an event, the administration is to be committed (*x*).

The incapacities of an administrator not only comprise those persons who have already been mentioned as disqualified for the office of executor (*y*) but extend to outlawry (*z*), and bankruptcy (*a*), or other lawful disability. But it is no incapacity to be an administrator that the next of kin is an alien (*b*).

Incapacities of administrator.

If the next of kin be a minor, administration must be granted to another person during his minority ; which species of administration will hereafter be considered separately (*c*). But on one occasion, administration, limited to the receipts of dividends in the English Funds, was granted by Sir John

Infancy.

(*u*) In the goods of Rogerson, 2 Curt. 656. In the goods of Southmead, 3 Curt. 28. In the goods of Widger, 3 Curt. 55. In the goods of Burchmore, L. R. 3 P. & D. 139. In the goods of Gardiner, 9 P. D. 66. In the goods of Webb, 13 P. D. 71. The Court granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother (a married woman) without her husband joining in it, she living separate from her husband, and all right to the

estate and effects of the deceased having been conveyed to her under a deed of separation : In the goods of Hardinge, 2 Curt. 640.

(*x*) See *post*, Pt. I. Bk. v. Ch. III. § VI.

(*y*) See *ante*, pp. 186—188.

(*z*) 1 Roll. Abr. 908. Bac. Abr. Exors. (G.) Toller, 93.

(*a*) Hills v. Mills, 1 Salk. 36. Com. Dig. Admor. (B.) 6.

(*b*) Com. Dig. Admor. (B.) 6. Upon this subject, see *ante*, p. 184.

(*c*) *Post*, Pt. I. Bk. v. Ch. III. § III.

Nicholl to a minor residuary legatee, the wife of a minor, both subjects of and resident in Portugal, on a certificate being produced that, by the law of Portugal, she was entitled (*d*).

However, in a subsequent case, Sir C. Cresswell refused to grant administration to a minor, though by the law of the country where the deceased was domiciled the minor was entitled to the grant, and that learned judge appeared to be of opinion, that the Court ought not to follow the practice of the Court of Domicil, where it was in contradiction to the English law, according to which the minor could not take upon himself the liabilities which the law casts upon an administrator—for instance, he could not execute a bond (*e*).

Feme covert :
before Married
Women's Pro-
perty Act,
1882 :

Coverture was no incapacity, even before the Married Women's Property Act, 1882, for the office of administratrix. Therefore, if a *feme covert* be next of kin to the intestate, administration shall be granted to her (*f*). But she could not, before the Married Women's Property Act, take administration without the consent of her husband (*g*), inasmuch, among other reasons, as he was required to enter into the administration bond, which she was incapable of doing. Yet if it could be shown that the husband was abroad, or otherwise incompetent, a stranger might join in the security in his stead (*h*). In either case the administration was committed to her alone, and not to her jointly with her husband : otherwise, if he should survive her, he would be administrator, contrary to the meaning of the Act (*i*).

since the
Married
Women's Pro-
perty Act,
1882, 45 & 46
Vict. c. 75.

Since the commencement of the Married Women's Property Act, 1882, a married woman may take administration without the consent of her husband, and in all respects act in the

(*d*) In the goods of the Countess of Da Cunha, 1 Hagg. 237.

(*e*) In the goods of the Duchess of Orleans, 1 Sw. & Tr. 253.

(*f*) Com. Dig. Admor. (B.) 6. *Ibid.* Admor. (D.)

(*g*) See *Bubbers v. Harby*, 3 Curt. 50.

(*h*) Toller, 91.

(*i*) Anon. Style, 74. Toller, 91. If it were committed to them jointly during the coverture it might perhaps be good, because, if committed to the wife alone, the husband for such period may act in the administration with or without her assent : Aley, 36.

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matter concerning the intestate's estate as if she were a *feme sole*.

SECTION III.

Of the Mode of granting Letters of Administration, and the practice relating thereto, and Form thereof.

In pursuance of the authority conferred by the Court of Probate Act, 1857, sect. 30 (*k*), a great many rules, orders, and instructions as to grants of letters of administration were made in the year 1862, for the regulation of the practice and of the fees of the Court, in respect both of contentious and non-contentious business, and the guidance both of the principal and district registrars. They run to so great a length that it would be impracticable to insert them in a treatise such as this.

Practice as to grants of letters of administration.

It is, therefore, thought better merely to refer the reader for them to the books of practice (*l*). But inasmuch as these "orders, rules, and instructions" are in fact in a great measure founded on the old practice of the Prerogative Court, it is thought advisable to retain all the statements contained in this and the preceding and some of the following sections of the former editions of this work as to the then established practice of that Court.

Administration is generally granted by writing under seal. It may also be committed by entry in the registry, without letters *sub sigillo*: but it cannot be granted by parol (*m*).

By what instrument or form.

By rule 45, P. R. (Non-contentious Business), "In every case where probate or administration is for the first time applied for after the lapse of three years from the death of

Time of granting letters.

(*k*) See *ante*, p. 269.

(*l*) Tristram and Coote's Practice, 10th ed., Browne on Probate. Some further rules, relating principally to pleas to declarations propounding Wills, were made and issued (to take effect on and after 11 Jan. 1866), and from time

to time further rules have been added which will be found set forth in the above books of practice.

(*m*) Anon. Show. 408, 409. Godolph. Pt. 2, c. 30, s. 5. Toller, 119.

the deceased, the reason of the delay is to be certified to the registrars, and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit." In the case of a recent death, if a party swear that he is one of the next of kin, the grant will issue without inquiry as to the knowledge of the other next of kin (*n*), but where there are other next of kin equally entitled thereto the registrars may require proof by affidavit that notice of the application has been given to them (*nn*).

The practice (by rule 44, P. R. (Non-contentious) is, that letters of administration shall not issue until after the expiration of fourteen days from the death of the intestate: unless for special cause (as that the goods would otherwise perish, or the like,) the judge or two of the registrars shall think fit to order them sooner (*o*).

Retracting
renunciation.

Where a party entitled to the grant of administration has renounced, such renunciation may be retracted before the administration has passed the seal (*p*).

Intestates
Widows and
Children Act,
1873, Stat. 36
& 37 Vict.
c. 52:

In the case of intestacies where the property of the person dying intestate is of small amount, facility for taking out letters of administration to his estate and effects is given by the Intestates Widows and Children Act, 1873 (36 & 37 Vict. c. 52).

s. 1:

This Act provides that where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow, or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the Registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said Registrar shall fill up the usual

(*n*) in the goods of *Darling*, 3 Hagg. 565.

(*nn*) Rule 28, P. R. *ante*, p. 362, note (*o*).

(*o*) 1 Ought. 323, tit. 219, s. 1,

note (*a*).

(*p*) *West v. Willby*, 3 Phillim. 379. See *M'Donnell v. Prendergast*, 3 Hagg. 212. *Ante*, p. 233.

papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the Registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate and transmit them by post to the said Registrar of the County Court to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this Act. (Sect. 1.)

[The Schedule to the Act gives a scale of fees payable according to the value of the estate to be administered. 5s. on £20 or under, and the sum, in addition, of 1s. for every £10 or fraction of £10 beyond £20.]

The Registrar of the County Court may require such proof s. 2: as he may think sufficient to establish the identity and relationship of the applicant. (Sect. 2.)

If the Registrar of the County Court has reason to believe s. 3: that the whole estate and effects, of which the intestate died possessed, exceeds in value one hundred pounds, he shall refuse to proceed with the application, until he is satisfied as to the real value thereof. (Sect. 3.)

The Registrars of County Courts may exercise for the s. 4: purposes of the Act the powers of Commissioners of the Court of Probate. (Sect. 4.)

Power to frame rules, orders, &c., for carrying the Act s. 5: into operation. (Sect. 5.)

Nothing in the Act is to affect any duty payable on letters s. 6: of administration. (Sect. 6.)

The provisions of the Act apply to Ireland. (Sect. 7.) s. 7.

By the Amendment Act passed in the year 1875 (38 & 39 Amendment Act, 38 & 39 Vict. c. 27), the provisions of the preceding Act were extended to children of poor intestate widows, and it was provided that the amending Act shall be read and construed along with and as part of the preceding Act.

SECTION IV.

Of Administration to the effects of Intestate Seamen, Marines, and Soldiers ; and therewith of personalty payable without representation obtained.

28 & 29 Viet.
c. 111.

Mode of obtaining administration to effects of deceased seamen, &c.

Ss. 3, 4.

To whom Act applies.

S. 5.
Where residue above 100l.

S. 6.
No representation necessary for sums under 100l.

S. 7.
Where representation obtained by creditor.

By stat. 28 & 29 Viet. c. 111 [Navy and Marines (Property of Deceased) Act, 1865], it is provided : Sects. 3 and 4, that on the death of any person being or having been an officer, seaman, or marine (*q*), or any person being or having been employed in any of Her Majesty's dockyards or other naval establishment, or in any of the civil departments of the Navy, or entitled to an allowance from the Compassionate Fund, or of any widow entitled to a pension on the establishment of the navy, the amount due by the Admiralty (thereinafter called the residue) shall be disposed of according to the provisions of the Act. Sect. 5, that where the residue exceeds 100l. the Admiralty shall pay it to the representative of the deceased. Sect. 6, that where the residue does not exceed 100l. representation to the deceased shall not be necessary, but the Admiralty may, if they think fit, require representation to be taken out, and in that case, or if representation is taken out otherwise, shall pay the residue to the representative. Sect. 7, that in the case of a seaman or marine, the Admiralty shall not be bound to pay the residue to his representative if representation has been obtained by a creditor as such, or by any person without complying with the regulations made by Order in Council (Dec. 28, 1865), but shall dispose of the residue under the Act as if representation had not been obtained.

(*q*) By sect. 2, "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer in Her Majesty's naval or marine force: "seaman" or "marine" means a petty officer or seaman, non-commissioned officer of marines, or marine, or any other

person forming part, in any capacity, of the complement of any of Her Majesty's naval or marine force (not being an officer within the meaning of this Act) or a petty officer or man of the Royal Naval Reserve or Naval Coast Volunteers.

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Sect. 8 provides that: "When the residue does not exceed 100*l.*, and representation is not taken out, then, subject to the other provisions of this Act, the Admiralty shall, as soon as may be, dispose of the residue as follows:—(1) They shall, if they think fit, pay the residue to any person showing herself or himself to their satisfaction to be entitled to take out representation to the deceased (otherwise than as a creditor), to the end that the residue may be applied by the person to whom it is so paid in a due course of administration; and the same shall be so applied accordingly (for which application the Admiralty may require such security as they think fit): (2) Or else the Admiralty shall, if they think fit, pay to the persons (if any) beneficially interested in the residue their respective shares thereof: (3) And in cases where the foregoing provisions of the present section do not apply, and the amount of the residue appears to the Admiralty insufficient to cover the expense of representation, the Admiralty shall dispose of the residue in manner prescribed by Order in Council."

Sect. 9 provides that in the case of a seaman or marine the Admiralty shall not make payment to a nominee of the representative or of a person entitled to obtain representation unless in special circumstances it seems to them safe and proper.

Sect. 10 provides that the Admiralty shall not dispose of the residue for three months from the receipt of notice of the death except by payment to the representative of the deceased, unless in special circumstances it seems to them safe and proper.

Sect. 11 provides that: "In the case of a seaman or marine where representation is not taken out, the Admiralty shall before disposing of the residue or any part thereof satisfy out of the residue (as far as the same will extend) any debt of the deceased of which they have notice, subject to the following conditions: 1st, That the debt accrued due within three years before the death: 2nd, That payment of it is claimed within two years after the death: 3rd, That the claimant proves the debt to the satisfaction of the Admiralty: 4th, That six

S. 8.
Disposal of
residue under
100*l.*, where
representation
not taken out.

S. 9.
Generally no
payment to be
made to
nominee of
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S. 10.
Generally no
disposal of
residue to be
made for
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except to
representative.

S. 11.
Payment of
debts by
Admiralty.

months have elapsed from the receipt by the Admiralty of notice of the death, and no person has shown herself or himself to the satisfaction of the Admiralty to be entitled to take out representation to the deceased." And further that a creditor shall be only entitled to obtain payment out of such residue by lodging a claim with the Admiralty and proceeding thereon under the Act.

S. 13.

S. 15.
Exemption
from duty.

Sect. 13 extends the provisions of the Act to unsold effects and money in charge of the Admiralty. Sect. 15 exempts residues under 100*l.* administered under the Act without representation from probate duty, and from stamp duty on the administration bond where the Admiralty requires such bond.

47 & 48 Vict.
c. 44.

Extension of
meaning of
certain words.

By 47 & 48 Vict. c. 44, s. 2, it is provided that all references in this Act to a pension or naval pension, or to money payable by the Admiralty, shall include a naval pension and a Greenwich Hospital pension, gratuity, and allowance within the meaning of the Greenwich Hospital Acts, 1865 to 1883, and any sum due on account of such.

Order in
Council of
Dec. 28, 1865.
Proceedings to
be taken on
death of
seaman
intestate.

The Order in Council of Dec. 28, 1865, provides, by Sects. XVIII., XIX., XX., XXI., XXII., for the proceedings to be taken in the case of a seaman or marine dying intestate leaving naval assets to which any person makes claim as widow or next of kin. They are similar to the proceedings in the case of the death of a seaman or marine leaving a Will required by Sects. XIII., XIV., XV., XVI., XVII., of the Order in Council, which have been already referred to of greater length (*r*).

Procedure in
case of officers,
&c., where
representation
not taken out
in England.

Sects. XXIV., XXV., XXVI., and XXVII., provide for procedure in the case of officers or any person described in Sect. 4 of 28 & 29 Vict. c. 111, dying and leaving naval assets not exceeding 100*l.* where representation is not required or intended to be taken out in England.

17 & 18 Vict.
c. 104, s. 199.
Where repre-
sentation to
merchant
seamen not
necessary.

In the case of merchant seamen it is provided by 17 & 18 Vict. c. 104, s. 199 (Merchant Shipping Act, 1854), that wages and property of seamen or apprentices not exceeding

(*r*) See *ante*, pp. 336, 337.

in value 50*l.*, subject to the provisions hereinafter contained and to such deductions as the Board of Trade think proper to allow, may be paid over by them to the persons entitled as therein mentioned, without representation being obtained. And by Sect. 201 provision is made for payment by the Board of Trade of just claims by creditors.

By stat. 19 & 20 Vict. c. 41, s. 5 (An Act to make further provision for the Establishment of Savings Banks for Seamen), it is provided that moneys due from the Board of Trade to the estate of any deceased depositor in any savings bank established under the Act shall be paid and applied to the same persons and in the same manner and subject to the same conditions as provided by the Merchant Shipping Act, 1854.

By stat. 11 Geo. IV. & 1 Wm. IV. c. 41, s. 5, as amended by 26 & 27 Vict. c. 57, s. 3, the Commissioners of the Chelsea Hospital with respect to pension or prize money, may authorise the agent for pensions, or other proper officer charged with the payment thereof, to pay to any person or persons who shall prove him, her, or themselves, to the satisfaction of such commissioners, to be the next of kin or legal representative, or otherwise legally entitled to any pension, or prize money, due to any deceased officer, non-commissioned officer, &c., such pension, &c., provided the same does not exceed 50*l.*, although no administration or probate shall have been obtained.

By stat. 2 & 3 Wm. IV. c. 53, s. 19, provisions are made as to the payment of prize money to the representatives of deceased soldiers.

By 27 & 28 Vict. c. 36, s. 3, which is in lieu of Sect. 25 of 2 & 3 Wm. IV. c. 53, it is provided that the Commissioners of Chelsea Hospital may in any case, if they think fit, authorize their treasurer or secretary to pay the share of prize money (s) not exceeding 50*l.* belonging to any deceased officer,

(s) "Prize money" by sect. 2, nature of prize or grant in the hands of the Commissioners for other allowance of money in the distribution.

S. 201.
Payment of
debts.

19 & 20 Vict.
c. 41, s. 5.
Deposits in
savings banks
for seamen.

11 G. IV. &
1 W. IV. c. 41,
s. 5.

Sums not
exceeding 50*l.*
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without ad-
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2 & 3 W. IV.
c. 53, s. 19.
Prize money of
deceased
soldiers.

27 & 28 Vict.
c. 36, s. 3.
Commissioners
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payment of
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exceeding 50*l.*
without repre-
sentation.

soldier, or other person, to or among any person or persons showing themselves entitled to the satisfaction of the Commissioners thereto or to shares thereof without representation being obtained.

2 & 3 W. IV.
c. 53, s. 26.

Claim of prize money by the next of kin of foreigners to be paid without administration, &c.

By 2 & 3 Wm. IV. c. 53, s. 26, it is enacted, that, in all cases of claim for prize money made by the next of kin of foreigners, who shall have been in the pay of his Majesty as non-commissioned officers or soldiers, and who shall have died intestate, it shall be lawful, when such next of kin shall reside out of his Majesty's dominions, for the treasurer or deputy treasurer of the said Hospital for the time being to pay such claims to such next of kin, or any person or persons duly authorised by such next of kin to receive the same, without the production of letters of administration; and, in all cases where such foreign non-commissioned officers or soldiers shall have made Wills, it shall be lawful for the treasurer or deputy treasurer, in like manner, to pay and satisfy such claims to the person or persons who, by inspection of the original Will, or an authenticated copy thereof, shall appear to be entitled thereto, or to such person or persons as he, or she, or they shall duly authorise to receive the same, without requiring the probate.

2 & 3 W. IV.
c. 53, s. 28.

By s. 28, a creditor taking out administration, is entitled only to the payment of the sum due to him at the time.

By stat. 26 & 27 Vict. c. 57, s. 15, and 47 & 48 Vict. c. 55, s. 4, special provisions are made for payment of the residue of the estate of officers and soldiers where it does not exceed 100*l.* without any representation being taken out to them. And by s. 16 of the former Act provisions are made for the disposal of the residue after the expiration of three months in the case of an officer and one month in the case of a soldier, where such residue does not exceed 100*l.* and representation is not taken out.

Other cases where representation not necessary.

These provisions of the Legislature for the payment of small sums to persons interested in the estates of deceased sailors and soldiers, without representation obtained, have been extended by other statutes to cases of persons interested

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in certain other small estates. Thus by 3 & 4 Vict. c. 110, s. 11, it is provided that in the case of the intestacy of a debenture holder depositor or other claimant entitled to receive any sum not exceeding 50*l.* out of the funds of a Loan Society, entitled to the benefit of the Act, the same may be paid as provided without representation obtained. So by 37 & 38 Vict. c. 42, s. 29, in the case of Building Societies under the Act, it is provided that a sum not exceeding 50*l.* due to any member or depositor who dies intestate may be paid as provided without representation obtained. And similarly in the case of Building Societies still governed by 6 & 7 Wm. IV. c. 32 (see Sect. 7 of 37 & 38 Vict. c. 42), sums not exceeding 20*l.* may be paid over. So in the case of depositors in Trustee or Post Office Savings Banks, it is provided by the regulations made in accordance with 50 & 51 Vict. c. 40, s. 3 (which supersedes previous similar provisions), for the nomination by depositors not under sixteen years of age of any person to whom any sum, not exceeding in the aggregate 100*l.*, payable to such depositor at his decease, may be paid at such decease, and in the absence of nomination for the payment without representation obtained to the persons and in the manner specified by the regulations. Similar provisions for nomination or payment of sums not exceeding 100*l.* without representation obtained have been made in the case of members of Friendly Societies by 38 & 39 Vict. c. 60, s. 15; in the case of members of registered Trade Unions by 39 & 40 Vict. c. 22, s. 10; and in the case of members of Industrial and Provident Societies by 39 & 40 Vict. c. 45, s. 11, as extended in all three cases by 46 & 47 Vict. c. 7, s. 3.

And lastly it is provided by 50 & 51 Vict. c. 67, s. 8, that sums not exceeding 100*l.* due from a public department in respect of any civil pay, superannuation or other allowance, annuity, or gratuity to any deceased person may, if the prescribed public department so direct, but subject to any regulations made by the Treasury, pay over the same as there directed without representation obtained.

3 & 4 Vict.
c. 110, s. 11.

Members of
loan society.

37 & 38 Vict.
c. 42, s. 29.

Members of
building
societies.

6 & 7 W. IV.
c. 32.

Depositors in
savings banks.

50 & 51 Vict.
c. 40, s. 3.

38 & 39 Vict.
c. 60, s. 15.
Members of
friendly
societies.

39 & 40 Vict.
c. 22, s. 10.
Members of
trade unions.

39 & 40 Vict.
c. 45, s. 11.
Members of
industrial and
provident
societies.

50 & 51 Vict.
c. 67, s. 8.
Civil servants.

46 & 47 Vict.
c. 47, s. 8.

As to payment
in certain
cases of sums
belonging to
illegitimate
persons
deceased.

It may here be noted that by 46 & 47 Vict. c. 47, s. 8 (Provident Nominations and Small Intestacies Act, 1883), it is provided: "If a member of any society who is entitled to make a nomination under this Act or the Acts hereby amended (*i.e.* to say members of Friendly, Industrial and Provident Societies, Trade Unions, and Savings Banks) is illegitimate, and has died intestate, and without having made any such nomination subsisting at his death, the directors may pay the sum which such member might have nominated to or among the person or persons who, in the opinion of the majority of them, would have been entitled thereto if such member had been legitimate, or, if there are no such persons, then the deposits shall be dealt with as the Commissioners of the Treasury may direct.

It has not been thought necessary in this Work to set out the above enactments at any greater length; for further information the reader should consult the Acts cited, and Tristram & Coote's Probate Practice, Part I. Chap. IV.

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CHAPTER THE THIRD.

OF SPECIAL AND LIMITED ADMINISTRATIONS.

SECTION I.

Of Administrations cum testamento annexo.

HITHERTO the subject has been confined to cases of complete intestacy. But it often happens, that the deceased, although he makes a Will, appoints no executor, or else the appointment fails: in either of which events, he is said to die *quasi intestatus* (a). The appointment of executor fails, 1. Where the person appointed refuses to act. 2. Where the person appointed dies before the testator, or before he has proved the Will; or where, from any of the causes specified in a former part of this work, he is incapable of acting. 3. Where the executor dies intestate, after having proved the Will, but before he has administered all the personal estate of the deceased. In all these cases, as well as where no executor is appointed, the Court must grant an administration, which is called administration with the Will annexed (b); and in the last instance it is also called administration *de bonis non* (c). The office of an administrator differs little from that of an executor (d): and it is plain that the Will to which it is annexed must be similarly proved, as though probate were taken of it by an executor (e).

Instances of
quasi intestacy.

Administration with the Will annexed: administration *de bonis non*.

(a) 2 Inst. 397.

(b) See *ante*, Pt. I. Bk. III. Ch. IV. p. 204, *et seq.*, and notes. But the Court will not grant administration with the Will annexed to the residuary legatee with the consent of the executor. It can only do so on the renunciation of probate by the executor, or, after citation has been served on him, upon his non-appearance within the prescribed

time: *Garrard v. Garrard*, L. R. 2 P. & D. 238.

(c) Com. Dig. Administrator (B. 1). Administration *de bonis non* must also be granted, whenever an administrator dies before he has administered all the effects. See *post*, sect. 2, p. 411, *et seq.*

(d) 2 Black. Comm. 535.

(e) Such administration must also be granted, if one of two

Cases not within the statute of administration.

It is obvious that many of the cases above contemplated are not within the statute of administration, 21 Hen. VIII. c. 5 (*f*), which provides only for intestacy, and the refusal of the appointed executor: Consequently in such instances the Court is left to the exercise of its discretion in the choice of an administrator, according to its own practice: and no person has such a legal right to preference as can be enforced by application to the Common Law Courts (*g*).

Practice to grant administration to him who has the greatest interest:

The rule of practice in the Ecclesiastical Court, in a case where the grant of administration is not within the statute, was to consider which of the claimants has the greatest interest in the effects of the deceased, and decree the administration accordingly, if there are no peculiar circumstances (*h*). Hence, in all cases where no executor is appointed, or the appointed executor fails to represent the

executors proves the Will and dies, and the other renounces: See *ante*, p. 206, 233. Com. Dig. Administrator (B. 1): So if a man name the executor of B. to be his executor, and die in the lifetime of B.; for until B.'s death, he is in effect intestate: *Graysbrook v. Fox*, 1 Plowd. 279, 281: Or if a man name an executor to have authority after a year from his death; for during the year he is without an executor: 1 Plowd. 279, 281. And it seems that in all cases where a man makes his testament and executors, and there is a mesne time in which the executors cannot or will not execute the office, the Ordinary ought in the mean time to grant administration: *Graysbrook v. Fox*, 1 Plowd. 279.

(*f*) See *ante*, p. 346.

(*g*) *Rex v. Bettesworth*, 2 Stra. 956. In the goods of Ewing, 6 P. D. 19.

1 (*h*) *Wetdrill v. Wright*, 2 Philim. 243, 248. In fact, in all

cases, whether within the statute or not (with the exception, according to the old practice, of the single instance of administration to a wife's effects, whose husband has died after her, but before her estate is administered, see *ante*, p. 349), the right of administration follows the right to the property: In the goods of Gill, 1 Hagg. 341. In a contest for administration, with the Will annexed, the Court preferred the sister of the testator to the widow as it appeared that the sister as a legatee had the larger interest in the property to be distributed: In the goods of Homan, 9 P. D. 61. See *ante*, p. 350, as to the grant being made to the persons having an interest under the Will of a married woman in preference to her husband. See also In the goods of Martindale, 1 Sw. & Tr. 8. In the goods of Pine, L. R. 1 P. & D 388.

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Hagg. 341. In a
administration, with
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testator, the residuary legatee, if there be one, is preferred to the next of kin, and entitled to administration *cum testamento annexo* (i). And so strong has been the effort of the Courts that the right of administration should follow the right of property, that although in the case of the appointed executor's renunciation, the letter of the statute expressly directs the Ordinary to grant administration to the next of kin, yet the spirit of the Act has been held, both by common lawyers and civilians, to exclude the next of kin where there is a residuary legatee; on the ground that in such case the next of kin have no interest (k). "The reason," said the Court, in *Thomas v. Butler* (l), "that the statute 21 Hen. VIII. required that administration should be granted to the next of kin, was, upon the presumption that the intestate intended to prefer him: But now the presumption is here taken away, the *residuum* being disposed of to another: and to what purpose should the next of kin have it, when no benefit can accrue to him by it? and it is reasonable that he should have the management of the estate who is to have what remains of it after the debts and legacies paid."

So the residuary legatee, even when there is no present prospect of any residue, is entitled to administration in preference as well as to the next of kin (m), as also to legatees and annuitants (n). So he is entitled though only residuary legatee in trust (o).

(i) The residuary legatee, it is said, is the testator's choice; he is the next person in his election to the executor: *Atkinson v. Barnard*, 2 Phillim. 318. If there are several entitled to the residue, administration may be granted to any of them: *Taylor v. Shore*, T. Jones, 162. Com. Dig. Administrator (B. 6). See *Dampier v. Colson*, 2 Phillim. 54.

(k) *Taylor v. Diplock*, 2 Phillim. 276, 277. In the goods of Gill,

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1 Hagg. 341, 342. See also *ante*, p. 374.

(l) 1 Ventr. 219.

(m) *Thomas v. Butler*, 1 Ventr. 219. Treat. on Eq. B. 4, p. 2, c. 1, s. 6; for, being once out of the statute upon the construction of the Will, there is nothing *ex post facto* can bring him within it: 1 Ventr. 219.

(n) *Atkinson v. Barnard*, 2 Phillim. 316.

(o) *Hutchinson v. Lambert*, 3

residuary
legatee pre-
ferred to next
of kin:

even where
there is no
residue, or
where he is
only trustee:

but next of kin have a *primâ facie* right.

The representative of the residuary legatee has the same right.

However, the next of kin has a *primâ facie* right, and therefore, where a party claims as, or derivatively from, a residuary legatee, the burden of proof lies on such party (*p*). Hence, where the husband appointed his wife executrix and residuary legatee, and he and his wife were drowned in the same ship, the Court granted administration to the next of kin of her husband, on the ground that the next of kin of the wife had not proved her survivorship (*q*).

Where the residuary legatee survives the testator, and has a *beneficial* interest, his representative has the same right to administration *cum testamento annexo*, as the residuary legatee himself, and is therefore entitled to administration in preference to the next of kin (*r*), or to legatees (*s*). Thus, if an executor be also residuary legatee, and die before probate, or intestate, before he has fully administered the estate, administration *cum testamento annexo* shall be granted to his personal representative, and not to the next of kin of the first testator (*t*). Hence, also, though generally speaking, if a

Add. 27. See, however, *contra*, as to mere trustees, *Coussmaker v. Chamberlayne*, 2 Cas. temp. Lee, 243. *Boddicott v. Dalzeel*, *ibid.* 294. *Fawkener v. Jordan*, *ibid.* 327. *Post*, p. 403 (*x*); but in no case will the Court decree administration to *substituted* trustees as such without the consent of all parties beneficially interested in the trust properties until the trust properties are actually vested in such substituted trustees. *Cresswell v. Cresswell*, 2 Add. 342.

(*p*) The next of kin, as to personalty, stands in the same position as the heir-at-law as to realty: *Underwood v. Wing*, 4 De G. M. & G. 633.

(*q*) *Taylor v. Diplock*, 2 Phillim. 261. In the goods of *Selwyn*, 3 Hagg. 748. *Underwood v. Wing*, 4 De G. M. & G. 633. *S. C. Wing*

v. Angrave, 8 H. of L. 183. In the goods of *Carmichael*, 32 L. J., P. & M. 70. In the goods of *Wheeler*, 31 L. J., P. & M. 40. See *post*, Pt. III. Bk. III. Ch. II. § v., where the question of survivorship among persons whose death is occasioned by the same cause is more fully considered.

(*r*) *Wetdrill v. Wright*, 2 Phillim. 243. See also *Thomas v. Baker*, 1 Cas. temp. Lee, 341.

(*s*) *Re Thirlwall*, 6 Notes of Cas. 44.

(*t*) *Ysted v. Stanley*, Dyer, 372 a, *ex relatione* Doctor Drury (Judge of the Prerogative Court). *Went. Off. Ex.* 82, 14th edition. *Godolph. Pt. 1, c. 20, s. 2*. Where the testator made his wife residuary legatee for life, and substituted his daughter after her death, and the widow proved the

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same covert executrix dies intestate, her husband cannot take out administration *de bonis non* to the first testator, yet if she be also residuary legatee, he may do so (*u*). But it should seem that where the residuary legatee is a mere trustee, it is the general rule of practice, upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate (*x*).

Although it was the practice of the Spiritual Court, grounded on the principle above stated, to grant administration to the residuary legatee, yet, as he had no legal right to it under the statute, the Court was not bound (as in the case of the sole next of kin of a complete intestate) to grant it to him. Thus, where the testator appointed two executors by his Will, and left the residue of his estate to his son, the executors renounced, and the son moved for a *mandamus* to obtain administration *cum testamento annexo*: But the Court refused to grant the writ, on the ground that none of the statutes mentioned the residuary legatee; and Lord Hardwicke adverted to a case in Chancery, before Lord Macclesfield, between *Wheeler* and the *Archbishop of Canterbury*, where it was held that this sort of administration is not within the statute (*y*).

If the residuary legatee declines, it is usual to grant administration *cum testamento annexo* to the next of kin: But it is clear, that when he has no interest he may be excluded, and the administration granted to a person who has an interest

Although practice is to grant administration to residuary legatee, he has no legal right to grant.

If the residuary legatee declines, administration usually granted to next of kin:

Will, and then both she and her daughter died; it was held that the personal representative of the daughter had a right to administration *cum testamento annexo*, in preference to the representative of the mother: *Wetdrill v. Wright*, 2 Phillim. 243.

(*u*) *Richardson v. Seise*, 12 Mod. 308. *Rous v. Noble*, 2 Vern. 249.

(*z*) *Hutchinson v. Lambert*, 3 Add. 27. *Coussmaker v. Cham-*

berlayne, 2 Cas. temp. Lee, 243.

(*y*) *Rex v. Bettesworth*, 2 Stra. 956. In the goods of *Ewing*, 6 P. D. 19, 25. But where the same person is both next of kin and residuary legatee, neither law nor practice will warrant a refusal to grant administration *cum testamento annexo* to such person, when the executors renounce: *Linthwaite v. Galloway*, 2 Cas. temp. Lee, 414.

in the effects, *e.g.* a creditor (*z*). In *Furlonger v. Cox* (*a*), the deceased left a widow and a son; the widow was sole executrix and universal legatee: She renounced probate, and the son contended for the administration against a creditor (*b*); the Court held that the son was excluded, the estate being insolvent, and gave the administration to the creditor (*c*).

but he may be excluded if he has no interest.

If there is no residuary legatee, the next of kin is entitled; if the next of kin decline, it may be granted to a legatee or creditor, upon notice.

If the executor fails to take probate, and there is no residuary legatee, the next of kin are entitled to administration *cum testamento annexo* (*d*). If the next of kin decline it, such administration may be granted to a legatee (*e*) or to a creditor (*f*); but notice must be given of the application of the legatee or creditor to the next of kin (*g*).

(*z*) *West v. Willby*, 3 Phillim. 381. See *Mayhew v. Newstead*, 1 Curt. 593, in which case the executor and residuary legatee having assigned his interest to trustees for the benefit of his creditors, administration with the Will annexed was granted to two of the trustees, he having been first cited.

(*a*) Prerog. Jan. 1811: cited by Sir John Nicholl, in 3 Phillim. 381.

(*b*) But, unless in cases where the next of kin has no interest in the property, a creditor cannot be allowed to contest the right to administration. *Ante*, p. 36, n. (*t*). And a residuary legatee, who has renounced, may retract his renunciation and claim the administration in preference to a creditor, though the estate is alleged to be deeply insolvent: In the goods of *Waters*, 2 Robert. 142.

(*c*) Lord Mansfield, in *The Archbishop of Canterbury v. House, Cowp.* 140, said, that "no next of kin ever struggled for the adminis-

tration of an insolvent estate with an honest view"

(*d*) *Kooye' Buyskes*, 3 Phillim. 531. Administration with a Will annexed, in which there was no executor nor residuary legatee, was decreed to two aunts of the deceased, legatees in the Will, and daughters of the next of kin, a grandmother, she being nearly ninety years of age, and incapable: *Re Hinckley*, 1 Hagg. 477.

(*e*) If there be a legatee for life and a legatee substituted, the practice is to prefer the former. But the Court will depart from its practice, when, were it to be followed, a question of construction of the Will would, in effect, be determined, and will make such a grant as will leave the question open: *Brown v. Nicholls*, 2 Robert. 399.

(*f*) *Kooystra v. Buyskes*, 3 Phillim. 531. *Snappe v. Webb*, 2 Cas. temp. Lee, 411.

(*g*) 3 Phillim. 531. Com. Dig. Administrator (B. 6). See also *Woolley v. Green*, 3 Phillim. 314.

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In all these cases, where a party has a prior title to a grant, he must be cited before administration is committed to any other person (*h*). Therefore the executor, if there be one, must be cited before a grant to a residuary legatee (*i*), a residuary legatee before a grant to a specific legatee, and so on, through all the gradations of priority. So if there is a testamentary disposition without an executor, it has been laid down that the party, in whose favour the disposition is made, must cite the next of kin, before he can have administration *cum testamento annexo* (*k*).

The Court will grant administration, with the Will annexed, to one of two universal legatees, a decree with intimation having issued in the name of the other, who is since dead (*l*). So administration, with the Will annexed, in which there was no executor, may be granted to one of two legatees, a decree with intimation having issued in their joint names against a residuary legatee (*m*).

When the executor resides out of the jurisdiction, adminis-

What citations are necessary before grants *cum testamento annexo*.

Administration to attor

(*h*) In the goods of Barker, 1 Curt. 592. *Ante*, p. 386, note (*f*).

(*i*) If there be two executors, and one alone has proved the Will, power being reserved to the other, both the executors must be cited: In the goods of Leach, Dea. & Sw. 294. See *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261, as to the citation of an executor who has already proved the Will in a court out of the jurisdiction, in a case where administration is required by the residuary legatee, in order to recover a debt within the jurisdiction.

(*k*) 3 Bac. Abr. 41, tit. Executors (E. 8). Accordingly in a case where an application was made for a grant of administration with the Will annexed to the sole legatee, on an affidavit, that the testator died possessed of no other

property than that specifically described in the Will, Sir Cresswell Cresswell held, that the next of kin ought to have been cited, but appears to have given the applicant his option of taking administration limited to the property disposed of by the Will: In the goods of Watson, 1 Sw. & Tr. 110. But on a subsequent occasion when this case was cited, the learned judge said that it was an exceptional case, and that the general rule was against such a grant, which should not be made unless some very strong reason be given: In the goods of Watts, 1 Sw. & Tr. 538.

(*l*) *Law v. Campbell*, 1 Hagg. 55.

(*m*) *Pickering v. Pickering*, 1 Hagg. 480. See *ante*, p. 378.

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ney to executor :

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it is revocable.

Consequence of the return of the executor.

tration *cum testamento annexo* may be granted to another person under a letter of attorney from the executor for his use and benefit (*n*). It should seem that a Will thus proved by the attorney of the executor is the same thing as if actually proved by himself. And, consequently, the chain of representation is not broken by his death, if he has himself appointed an executor (*o*). Again, the letter of attorney is revocable; and when the executor revokes it and desires probate, the Court is bound to grant it to him (*p*).

On one occasion, administration, with the Will annexed, had been granted for the use and benefit of the executor, then at sea, to his attorney: The executor having returned to England, and being desirous of probate, and the administration with the Will annexed having been brought in by the attorney, (with the usual affidavit, "that no action at law, or suit in equity, had been brought by or against him as administrator,") had been sworn as executor: And he prayed that the administration should be declared to have *ceased and expired*, and that probate should be granted to him: The application, in respect to the letters of administration, was objected to in the Registry, on the ground that in some similar cases the administration had been expressly revoked: In support of the motion, it was urged that the administration, having been rightly granted, ought not to be revoked: A revocation which was unnecessary might possibly be injurious; for it might render some of the administrator's acts void: and would certainly be inconvenient: for the probate would be considered at the Stamp Office as an original, and consequently probate duty required to be paid as for an original grant, and the duty, already paid on the administration, could only be recovered upon a special application to the commissioners, supported by affidavit: whereas, if the administration were declared to have *ceased and expired*, the probate

(*n*) See *ante*, p. 376. In the goods of Barker [1891] P. 251. Murguia, 9 P. D. 236.

(*p*) *Pipon v. Wallis*, 1 Cas. temp.

(*o*) In the goods of Bayard, 1 Lee, 402.

Gert. 768. In the goods of

would pass at the Stamp Office upon a free stamp: The Court (Sir John Nicholl) declared the administration *cum testamento annexo* to have *ceased and expired*; and directed that, in future, grants, *durante absentia*, to attorneys, should be limited "for the use and benefit of resident at , and until the executor (or the party entitled to the administration) should duly apply for, and obtain, probate or administration (q)."

On the death of the executor the letters of administration cease to be of any force; and therefore the administrator cannot make a good title, if he sells leasehold property of the deceased, unless he can warrant to the purchaser that the executor is alive (r).

Consequence of the death of the executor.

It may here be observed, that a person who is entitled to probate as executor cannot be allowed to take out administration *cum testamento annexo* (notwithstanding the inconvenient effect which the taking probate may in some cases have, by reason of continuing the chain of representation to some other party whose executor the testator happens to be). For if a person be entitled to a grant in a superior character, the Court will not make that grant to him in an inferior character (s). Accordingly, by rule 50, P. R. 1862 (Non-contentious), "No person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character (t)."

The executor is not allowed to take administration *cum testamento annexo*.

A person entitled to the grant in a superior character not to take it in an inferior.

(q) In the goods of Cassidy, 4 Hagg. 360. Webb v. Kirby, 7 De G., M. & G., 381. As to the effect of the death of the executor, see Suwerkrop v. Day, 8 A. & E. 624.

(r) Webb v. Kirby, 7 De G., M. & G. 376, reversing the decision of the V.-C., 3 Sm. & G. 333.

(s) In the goods of Bullock, 1 Robert. 273. In the goods of Richardson, 1 Sw. & Tr. 515. In the goods of Morrison, 2 Sw. & Tr.

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(t) As to the construction of this rule, see In the goods of Loftus, 3 Sw. & Tr. 307, which decides that it is competent for the Court to treat the rule as intended for the general guidance of the business in the Registry, and capable of modification by the Court, if sufficient reason can be shown for departure from it.

SECTION II.

Of Administration de bonis non.

This subject may be treated with reference, 1st, to the death of an executor: 2ndly, to the death of an administrator.

1. Consequences of the death of an executor:

1. With respect to the consequences of the death of an executor. If a sole executor happens to die, without having proved the Will, the executorship, as there has before been occasion to observe (*u*), is not transmissible to his executor, but is wholly determined, and administration *cum testamento annexo* must be committed to the person entitled, according to the rules pointed out in the preceding section.

When the administration is granted under such circumstances, although the executor may have administered in part by disposing of the testator's effects, &c., yet the administration shall not be *de bonis non administratis*, but an immediate administration: because, although the acts done by the executor are good (*x*), the administering is an act *in pais*, of which the Court of Probate cannot take notice (*y*).

If one of several executors dies before, or after, probate, no interest is transmissible to his own executor, but the whole representation survives to his companion (*z*). Where such surviving executor, or where a sole executor, dies after probate, having made a Will, appointing his own executor, the entire representation of the original testator will be transmitted to him (*a*). But where such surviving executor, or sole executor, dies after probate, intestate, then no interest is transmissible to his own administrator (*b*): but administration of another sort becomes necessary, which is called ad-

where sole or surviving executor dies after probate intestate, there must be administration *de bonis non*:

(*u*) *Ante*, pp. 205, 257.

(*x*) See *ante*, p. 250.

(*y*) *Wankford v. Wankford*, 1 Salk. 308, by Holt, C. J.

(*z*) *Ante*, p. 208.

(*a*) *Ante*, pp. 204, 206. The rule is the same, though the original Probate was limited: In the goods of Beer, 2 Robert. 349.

(*b*) *Ante*, p. 204.

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ministration *de bonis non*, that is, of the goods of the original testator left unadministered by the former executor (c).

So if the original testator dies abroad, or in the colonies, and his executor proves the Will there, and then dies, having appointed his own executor, who proves the latter Will in the Probate Court here, it has been held, that the executor of the executor does not represent the first testator: But that in order to constitute such a personal representative here, administration *de bonis non* must be obtained in the Probate Court in this country (d).

In a case where the estate of a testatrix had been administered except as to one legacy, the Court granted administration with Will annexed *de bonis non* to the legatee without requiring the representative of the executor, or residuary legatees to be cited (e). And upon an application for a grant of administration *de bonis non*, where it appeared that the residuary legatee, resident abroad, had had notice by letter, and that he had no beneficial interest, there being actually no residue, the grant was made to a specific legatee, without requiring the residuary legatee to be cited or to renounce (f).

Again, before the Court of Probate Act (1857), 20 & 21 Vict. c. 77, if there were several executors, and one alone proved the Will, and the rest renounced, upon the death of him who had proved, no interest was transmissible to his executor; but the representation survived to the co-executors, who might retract their former renunciation, and assume the executorship (g); but if they persisted in refusing to act, the sort of administration just mentioned became necessary.

But now by the 79th section of that statute, "where any person after the commencement of this Act renounces probate of the Will of which he is appointed executor or one

so where the executor appoints his own executor if the original Will was not proved in this country:

where estate administered except as to one legacy:

so where one of several executors proves, and the rest renounce, and he who has proved dies:

Stat. 20 & 21
Vict. c. 77,
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(c) *Ante*, p. 205. *Tingrey v.* 162.

Brown, 1 Bos. & Pull. 310.

(d) *Twyford v. Trail*, 7 Sim. 92.

In the goods of *Gaynor*, L. R. 1
P. & D. 723.

(e) In the goods of *King*, 8 P. D.

(f) In the goods of *Wilde*, 13
P. D. 1.

(g) *Arnold v. Blencowe*, 1 Cox,
426. *Ante*, pp. 206, 233.

of the executors, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor" (h).

Who is entitled to administration *de bonis non cum testamento annexo*.

This administrator *de bonis non* will, when appointed, be the only representative of the party originally deceased. Such administration will evidently be committed *cum testamento annexo*, and will be granted to the person entitled according to the general principles already developed in cases of administration *cum testamento annexo*. In many instances, it is obvious, he will be a different person from the representative of the deceased executor; but if the executor were also beneficially residuary legatee, his representative will likewise be entitled to the administration *de bonis non* to the original testator (i).

Where administration *durante minoritate* was in the first instance granted to the mother of an infant, a part residuary legatee, on the renunciation of the executor: The infant died: By his death the administration ceased, and the mother became entitled, as widow, to the lapsed residue jointly with another infant: Under these circumstances, administration *de bonis non*, with the Will annexed, was decreed to her (k).

Administration *de bonis non* not necessary when there is an administration *durante minoritate* of an executor of an executor.

It has been said, upon the authority of *Limmer v. Every*, as reported by Croke (l), that where an executor dies, having appointed an executor, who is a minor, and an administrator *durante minoritate* is appointed, he has no authority to intermeddle with the effects of the original testator, but an administration *de bonis non* must be granted (m). However, as the case is reported by Leonard (n), the point decided was

(h) See *ante*, pp. 233, 234.

(i) See *ante*, p. 402.

(k) *Akers v. Dupuy*, 1 Hagg. 473.

(l) Cro. Eliz. 211.

(m) 3 Bac. Abr. 13, Exors. (B. 1).

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(n) 4 Leon. 58, *nomine Limver v. Evorie*.

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merely that such an administrator should sue as administrator of the first testator: And in a later case (o), it was held, on an application for a prohibition, that although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore ætate* is *in loco executoris*, and may be sued as the executor of an executor may (p).

2dly. With respect to the consequences of the death of an administrator, or of one entitled to administration. It has already been shown, that if a party who, as next of kin to the intestate at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant is required (q).

Where administration has been granted to two and one dies, the survivor will be sole administrator (r), for it is not like a letter of attorney to two, where by the death of one, the authority ceases, but it is an office analogous to that of executor, which survives (s). Upon the death of such surviving administrator, or of a sole administrator, in order to effect a representation of the first intestate, the Court, whether the administrator died testate or intestate, must appoint an administrator *de bonis non*; for an administrator is merely the officer of the Court, prescribed to it by Act of Parliament, in whom the deceased has reposed no trust; and therefore on the death of the administrator, no authority can be transmitted by him to his executor or admini-

2. Consequences of the death of an administrator, or of one entitled to administration:

of one of several administrators:

of a surviving or sole administrator.

(o) Anon. 1 Freem. 288.

(p) See also Norton v. Molyneux, Hob. 246; and Mr. Smirke's note, in his edition of Freeman, p. 288.

(q) *Ante*, pp. 374, 375.

(r) Hudson v. Hudson, Cas. temp. Talb. 127, decided by Lord

Talbot, after hearing civilians. Eyre v. Lady Shaftsbury, 2 P. Wms. 121. Com. Dig. Administrator (B. 7). Jacomb v. Harwood, 2 Ves. Sen. 268.

(s) Adam v. Buckland, 2 Vern.

514. 3 Bac. Abr. 56, tit. Executors (G).

nistrator, but it results to the Court to appoint another officer (t).

Who is entitled to administration *de bonis non* on the death of the original administrator :

It remains to be considered who, upon the death of the administrator, is entitled to be appointed administrator *de bonis non* to the original intestate.

The Ecclesiastical Judges have on several occasions laid down, that in all that regards the obligation of the statutes of administration on the Court, in the grant of administration, no distinction exists between an original and a *de bonis non* administration (u). And in *Kindleside v. Cleaver*, the Common Law Judges Delegates expressed the same opinion (x). Accordingly, upon the death of an original administrator, a person who was next of kin at the time of the death of the intestate, has been regarded as entitled, under the statute of Hen. VIII., to the *de bonis non* grant, in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death ; and hence, in the case where a husband takes out administration to his wife, and dies, the Spiritual Courts for a long time considered themselves bound by the statute (in contravention of convenience, and of the general principle that the right of administration shall follow the right of property), to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death, as having an absolute statutable right; although the beneficial interest in her effects be in the representative of the husband (y). But the practice has been altered in this respect : And the rule now established, on the principle that the grant ought to follow the interest, is, that

Rule now established.

(t) 2 Black. Comm. 508.

(u) Dr. Bettesworth, in *Kindleside v. Cleaver*, 1 Hagg. 345. Dr. Hay, in *Walton v. Jacobson*, 1 Hagg. 346.

(x) See 2 Hagg. Appendix, 170.

(y) *Kindleside v. Cleaver*, 1 Hagg. 345. See *ante*, pp. 350, 351.

Yet instances may be found, where, notwithstanding the statute, the Court have denied administration to the next of kin, on the ground of his having no interest. See *Young v. Pierce*, 1 Freem. 496. *Ante*, p. 374.

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the administration will be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest (2).

Again, it has been held that the statutes only regard *the next of kin at the time of the death* of the intestate, and not the next of kin at the time a second grant is wanted; and therefore when the next of kin, who were so at the time of the deceased, are dead, the Court has power, independent of the statute, to grant administration *de bonis non*, at its discretion according to its own rules (a). In the guidance of which discretion, the established principle is (as in the case of administration *cum testamento annexo*), that if there are no peculiar circumstances, the administration shall be committed to him who has the greatest interest in the effects of the original intestate (b). Thus, in *Savage v. Blythe* (c), the intestate died, leaving a brother and several nephews and nieces: Administration was granted to the brother, and at the end of the year he distributed, taking the securities of the deceased upon himself: he afterwards died, leaving the securities due to the original deceased outstanding; and having made a Will, and appointed an executor: a decree was taken out against the nephews to show cause why administration *de bonis non* should not be granted to the executor of the brother administrator: The nephews appeared, and prayed administration as next of kin under the statute: But Sir Wm. Wynne held that the statutable right was confined to the next of kin at the time of the death, and granted the administration *de bonis non* to the executor of the deceased administrator, on the ground that the interest was clearly in him. In the subsequent case of *Almes v. Almes* (d), the same Judge again granted similar administration, under nearly the same circumstances, upon the same grounds; and

Administration *de bonis non* granted to the executor of deceased administrator having the greatest interest in the effects.

(a) *Fielder v. Hanger*, 3 Hagg. 780. In the goods of Pountney, 4 Hagg. 290. *Ante*, p. 351.

(a) *Carlisle v. Harvey*, 1 Cas. temp. Lee, 179.

(b) But the Court is not obliged to grant to the largest interest: 1 Cas. temp. Lee, 177.

(c) 2 Hagg. Appendix, 150.

(d) *Ibid.* 155.

mentioned the case of *Lovegrove v. Lewis* (e), decided by Sir George Hay, and affirmed by the Delegates, where the administration was granted to the executor of the original administrator, to the exclusion of those who were next of kin at the time of the grant (f). So in the instance of administration *de bonis non* to the effects of the wife, after the death of the husband administrator, if the persons who, at the time of her death, were her next of kin are dead, it has always been held that the Court may exercise its discretion (g).

The proposition, however, that if all who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to administration *de bonis non*, must, it appears, be understood with this limitation, viz., that a person originally in distribution is preferred to the representative of the next of kin (h).

It has already been observed, that upon the death of a creditor administrator, a party who was next of kin at the time of the death of the intestate may come in and claim administration *de bonis non* (i). And though all the next of kin at the time of the death are dead, it should seem that no grant of administration *de bonis non*, however limited in its object, can be obtained after the termination of the creditor administration, without citing those who are next of kin at the time the grant is required. Thus, in *Skeffington v. White* (k), the intestate died in 1790, leaving two sisters entitled in distribution: They renounced, and administration

Citation of
next of kin
before grant
of administra-
tion *de bonis*
non.

(e) S. C. 2 Hagg. Appendix, 152, n. (a).

(f) See also In the goods of Middleton, 2 Hagg. 60.

(g) By Sir John Nicholl, In the goods of Gill, 1 Hagg. 344.

(h) See the Appendix to 2 Hagg. p. 157. But this rule, in the discretion of the Court, may be varied by granting the administration to

the next of kin: In the goods of Carr, L. R. 1 P. & D. 291. According to the general practice, a party having a direct interest is preferred to those entitled in a representative character: In the goods of Middleton, 2 Hagg. 61.

(i) *Ante*, p. 382, note (i).

(k) 1 Hagg. 699.

Ch. III. § III.] *Of Limited Administrations.*

was decreed in 1791, to a creditor, who administered the estate till 1806, when he died: the sisters did not come in and take administration *de bonis non*; and from that time no further representation was taken out till 1827, when an administration *de bonis non* was granted, *without citing the then next of kin* (the son of one of the sisters, who were both dead), limited to assign a certain leasehold property of the deceased, not severed in his lifetime, but mortgaged during the original creditor administration: In March, 1828, Sir Lumley Skeffington, the then next of kin in whom all the beneficial interest in the deceased's estate was vested, obtained a decree to show cause why the latter administration should not be revoked, on the ground of his not having been cited when the limited grant was made, and on a suggestion that such grant had been surreptitiously obtained, and that there was a surplus belonging to the deceased's estate: Sir John Nicholl thought the citation under the circumstances was not necessary, but that Sir Lumley was barred by time, by events, and by his own laches; and that there was no ground for revoking the grant: However, on appeal to the Delegates, the Court pronounced for the appellant, directed a monition to issue to call in the limited administration, and condemned the respondent in costs (1).

SECTION III.

Of Limited Administrations.

Besides the Administrations already discussed, which extend to the whole personal estate of the deceased, and terminate only with the life of the grantee, it is competent to the Court to grant *limited* administrations, which are confined to a particular extent of time, or to a specified subject-matter. It will be the object of the present and three following sections, to consider this species of grant.

(1) 2 Hagg. 626.

Rule 29, P. R. 1862. Consent or citation of persons entitled to general grant.

Rule 30. A person entitled to general grant not to take a limited one.

By Rule 29, P. R., "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge."

By Rule 30, "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the Judge."

Administration durante minore etate.

If the person appointed sole executor, or he to whom, in case of intestacy, the right to administration has devolved under the statutes, be within age, a peculiar sort of administration must be granted, which is called an administration *durante minore etate*. In the former case, it is obviously a species of administration *cum testamento annexo*.

When necessary:

If there are several executors, and one of them is of full age, no administration of this kind ought to be granted; because he who is of full age may execute the Will (*m*). But it has been held differently in the case of several next of kin in equal degree, entitled under an intestacy. In *Cartwright's case* (*n*), the intestate died leaving four grandchildren whereof one was of age, and the other three were minors; and the administration was contested betwixt her that was of age and the mother and guardian of the other three; and this case was argued at Serjeants' Inn, before the two Chief Justices and the Chief Baron, *et al.*, who granted it to the mother, as guardian to the three, *durante minore etate*; though it was strongly urged, that she that was of age being capable, and the others incapable, she ought to be preferred: But, on the other hand, it was laid down, that since the statute 22 & 23 Car. II. c. 10, which entitled them all to a distribution, the interest of the three preponderated, and

(*m*) Pigot and Gascoigne's case, Brownl. 46. *Ante*, p. 185. There are some authorities to the contrary: See Colborne v. Wright,

2 Lev. 240. Bac. Abr. Executors (B. 1).

(*n*) 1 Freem. 258. *Ante*, p. 362.

therefore that was to be regarded; and they compared it to the case of a residuary legatee who shall be preferred before the next of kin (*o*).

This sort of administration has been frequently held not to be within the statute of 21 Hen. VIII. c. 5. And consequently, it is discretionary in the Court to grant it to such person as it shall think fit (*p*). Thus, in the case of *Rex v. Bettesworth* (*q*), a *mandamus* was moved for, to be directed to the Judge of the Prerogative Court, to grant administration to one Smith, during the minority of his two infant grandchildren: The Judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions among the creditors: The Court were of opinion that the Judge had a discretionary power in granting administration *durante minore ætate*, and therefore that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant: But they said if a *mandamus* had been moved for, to grant administration generally, they would have granted it (*r*).

no *mandamus* lay to grant it to a particular person.

In the exercise of this discretion it was the practice of the Spiritual Court to grant the administration to the guardian whom that Court had a right by law to appoint for a personal estate (*s*). With respect to the appointment of guardian a

Practice of the Spiritual Court to grant administration to the guardian:

(*o*) See *ante*, p. 401.

(*p*) *West v. Willby*, 3 Phillim. 379.

(*q*) 1 Barnard, 370, 425.

(*r*) The discretionary power of the Spiritual Court is also recognized in the statute 38 Geo. III. c. 87, s. 6. See *post*, p. 421.

(*s*) In the goods of Weir, 2 Sw. & Tr. 451. See also Brotherton v. Harris, 2 Cas. temp. Lee, 131: In this case it was held that the guardian appointed by the Ecclesiastical Court was to be preferred to the guardian appointed by the Court of Chancery. But see note

(70) to Co. Lit. 88, b, by Hargrave, in which the right of the Ecclesiastical Court to appoint a guardian for the personal estate is doubted. In the case of In the goods of Sartoris, 1 Curt. 910, administration, for the use and benefit of minor children of a Frenchman deceased, was granted to their guardian appointed by the French authorities. It has been held that a testamentary guardian of minor children is entitled to a grant of the administration for their use and benefit preferably to a guardian elected

distinction
between infant
and minor :

distinction exists between an infant and a minor. The former is so denominated, if under seven years of age, the latter from seven to twenty-one (*t*). The Court *ex officio* assigns a guardian to an infant (*u*); the minor himself may nominate his guardian, who is then admitted in that character by the Judge (*x*); but if the minor makes an improper choice, the Court will control it (*y*). According to the practice of the Prerogative Court, the guardianship was granted to the next of kin of the child, unless sufficient objection to him was shown (*z*).

If a wife be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit, during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her (*a*).

the guardian
sometimes
excluded.

But there are many instances where the Court has granted the administration to persons not guardians of the minor,

by the children : In the goods of Morris, 2 Sw. & Tr. 360. The guardian of an infant, sole next of kin of an intestate, whose estate is solvent, is entitled to take administration of his effects, in preference to creditors : John v. Bradbury, L. R. 1 P. & D. 245. As to giving justifying security in such a case, see *ibid.* The general rule, however, is that the creditors as such have no right to call upon the next of kin to give justifying security : Hughes v. Cookson, 1 Cas. temp. Lee, 386. Hickman v. Black, 2 Cas. temp. Lee, 251.

(*t*) Toller, 100.

(*u*) Sir G. Lee was of opinion, that he could not assign a guardian to an infant in *ventre de sa mère*; Walker v. Carless, 2 Cas. temp. Lee, 560.

(*x*) Rich v. Chamberlayne, 1 Cas. temp. Lee, 134.

(*y*) Fawkener v. Jordan, 2 Cas. temp. Lee, 330. This is mentioned by Lee, J., in Rex v. Bettesworth, Fitzg. 164, Mich. 4 Geo. II., as being then the course of the Spiritual Court.

(*z*) Toller, 100. In the goods of Ewing, 1 Hagg. 381. But the Court may, in its discretion, pass by the next of kin : In the goods of Ewing, 1 Hagg. 381, *post*, 419, note (*e*). Quick v. Quick, 33 L. J., P. & M. 177. In the goods of Gardiner, 9 P. D. 66. In the goods of Webb, 13 P. D. 71. On one occasion a creditor was appointed guardian to minors (the only children of E. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent : In the goods of Peck, 1 Sw. & Tr. 141. (*a*) Toller, 92.

Ch. III. § III.] *Administration durante minore ætate.*

and refused to grant it to the person nominated by them. Thus in *Lovell and Brady v. Cox* (b), Lovell and Brady were appointed trustees by the deceased, and his heir, Anne Cox, was executrix and residuary legatee: She was a minor, and the father claimed the administration *pendente minoritate*: The Court held that it had a discretionary power, refused it to him, and gave it to the trustees (c). So the administration may be granted to creditors, in exclusion of the guardian of the minor, if the estate is insufficient to pay the debts: And in many other cases it has been laid down that the Court is not bound by the choice of the minor (d). Thus, where a grandfather, to whom, as the next of kin, the administration *durante minoritate* would in the ordinary course have passed, was turned eighty, it was granted to an uncle, he giving full justifying security (e).

In *Havers v. Havers* (f), Lord Hardwicke, C., said, that administration *durante minore ætate* ought not to have been granted to a person who was very poor, though the guardian and next of kin of the infant.

The old practice above stated has been applied, and in some respects varied, by the rules, P. R. Non-contentious, as follows:—

By Rule 33, "Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with."

34. "In cases of infants (*i. e.*, under the age of seven years, Rule 34.

(b) Prerog. cited by Sir John Nicholl in *West v. Willby*, 3 Phillim. 379.

(c) See also *Appleby v. Appleby*, 1 Cas. temp. Lee, 135, where administration *cum testamento annexo* was granted to a grandmother during the minority of an executor, she being also testa-

mentary trustee, in preference to the mother, whom the minor had chosen guardian. See also *Hughes v. Ricards*, 2 Cas. temp. Lee, 543.

(d) *West v. Willby*, 3 Phillim. 374.

(e) In the goods of Ewing, 1 Hagg. 381.

(f) *Barnard. Chanc. Cas.* 23.

Rules P. R.
1862 (Non-
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as to grants to
guardians.
Rule 33.

not having a testamentary guardian, or a guardian appointed by the High Court of Chancery), a guardian must be assigned by order of the Judge, or of one of the Registrars; the Registrar's order is to be founded on an affidavit, showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship."

Rule 35.

35. "Where there are both minors and infants, the guardians elected by the minors may act for the infants without being specially assigned to them, by order of the Judge or a Registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge or of a Registrar."

Rule 36.

36. "In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants."

Administration granted to a minor, a foreigner, entitled by the law of his own country.

In a case in the Prerogative Court, the residuary legatee was a minor, married to a husband who was also a minor, both being subjects of, and resident in, Portugal: But it appeared that the husband, by reason of his holding a commission in the army, and being married, by the law of Portugal was considered of full age, and that by her marriage, her disabilities, as a minor, ceased: Under these circumstances, administration with the Will annexed, limited to the receipt of certain dividends in the English funds, was granted to the wife (*g*).

(*g*) In the goods of the Countess Da Cunha, 1 Hag. 237. But see *contra*, In the goods of Orleans, 1 Sw. & Tr. 253, in which Sir C.

Where an intestate left a widow and infant son, and administration was granted to the widow, who soon after became *non compos*, and the estate was small and unable to bear the expense of a commission of lunacy, and there were debts owing to it, which were in danger of being lost, if there was no person to receive them; Sir George Lee, without revoking the administration granted to the widow, assigned (upon the renunciation and consent of the grandmother), the infant's aunt to be his guardian, and granted administration to her also, for the use and benefit of the widow and infant, during the incapacity of the widow, and the minority of the infant, if the widow should not sooner recover her senses: And the learned Judge directed the administration to be drawn up in a special form, reciting the above particulars (*h*).

It has already been pointed out (*i*) that formerly an infant executor was considered capable of the office, on attaining the age of seventeen: But now by statute 38 Geo. III. c. 87, s. 6 (*k*), after reciting that inconveniences arose from granting probate to infants under the age of twenty-one, it is enacted, "That where an infant is *sole* executor, administration with the Will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the Will shall be granted to him."

And by the seventh section it is enacted, "That the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore etate* of the next of kin."

Before this Act there was a distinction between administra-

Administration during the incapacity of a widow, and minority of her son.

When administration *durante minore etate* shall be determined.

Stat. 38 Geo. III., c. 87, s. 6.

S. 7.

Cresswell held that the Court will not follow the grant of the country of domicile when it would by so doing be acting in contradiction to the law of this country.

(*h*) 1 Cas. temp. Lee, 625.

(*i*) *Ante*, p. 185, n. (*q*).

(*k*) Extended to Ireland, by 58 Geo. III. c. 81, ss. 1, 2.

tion granted during the minority of an infant executor and an infant next of kin: inasmuch as in the latter case the administration has always been held to continue in force till the next of kin attained the age of twenty-one (l).

It seems agreed, that if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them. Thus if there be several infant executors, he who first attains the age of twenty-one shall prove the Will, and may execute it (m).

It was resolved, according to Lord Coke, by the justices of the Common Pleas in *Prince's Case* (n), that if administration be committed during the minority of an executrix, and she take husband of full age, then the administration shall cease. But this has since been doubted, in the case of *Jones v. Lord Strafford* (o), where Lord King, C., and Raymond, C.J., strongly inclined against this opinion as reported in *Prince's Case*, the same not being taken notice of by other contemporary Reporters, as 2 And. 192. Cro. Eliz. 718, 719, and 3 Leon. 278, in all which books *Prince's Case* is reported: Besides which it was extrajudicially expressed, the question in the case being only whether such a special administrator could assign over a term for years which belonged to the testator: and it is remarkable that the author of the Office of Executor, after mentioning the proposition as stated in *Prince's Case*, proceeds, "Yet I do a little marvel at these opinions, considering that these things are managed in the Spiritual Court, and by that law (the law spiritual) which intermeddles not with the husband in the wife's case; now by that law, and not our common law, comes in this limit of seventeen years. And I have seen it otherwise reported, in and touching the last point" (p).

If administration be granted during the minority of several

(l) Freke v. Thomas, 1 Lord more's edition.
Raym. 667. 4 Burn, E. L. 384, (n) 5 Co. 29, b.
Phillimore's edition. (o) 3 P. Wms. 88.

(m) 4 Burn, E. L. 385. Philli- (p) Page 392, 14th edition.

infants, one of whom dies before he comes of age, this will not determine the administration (*g*). If an administrator *durante minore ætate* recovered judgment, and then his time determined, the executor formerly might have had a *scire facias* upon that judgment. As to the proceedings substituted in lieu of *scire facias* by the Judicature Act, 1875, see *post*, Pt. II., Bk. II., Ch. 4.

Formerly questions seem to have been raised about the power of an administrator *durante minore ætate*, but it seems now settled that the limit to his administration is the minority of the person, but there is no other limit. He is an ordinary administrator, appointed for the very purpose of getting in the estate in the usual way, and the property vests in him (*r*). A power of sale given by a testator to his executors or administrators may be executed by an administrator *durante minore ætate* (*s*).

Administration *durante minore ætate*,
limit of :

what acts such
administrator
may do.

So he may assent to a legacy, if there are assets for the payment of debts (*t*). So he may be sued for the debts due from the deceased : and if he give his bond for any of such debts, he may retain goods to the value (*u*) : and if an action be brought against him, and the administration determine pending the action, he ought to retain assets to satisfy the debt which attached on him by the action (*x*). Likewise he may retain for his own debt (*y*).

It has been said that he cannot do anything to the prejudice of the infant ; and therefore he cannot sell the goods of the deceased any farther than they are necessary for payment of debts, nor can he otherwise sell a term for years during the minority of the infant (*z*).

(*g*) Anon. Brownl. 47. Jones v. Stafford, 3 P. Wms. 89, overruling the opinion in Brudnel's Case, 5 Co. 9, a.

(*r*) See *Re Cope*, 16 C. D. 49.

(*s*) Monsell v. Armstrong, L. R. 14 Eq. 423.

(*t*) Bac. Abr. Exors. (B. 1), 2. Prince's case, 5 Co. 29, a. Anon.

1 Freem. 288.

(*u*) Briers v. Goddard, Hob. 250. Com. Dig. Admon. (F.).

(*x*) Sparkes v. Crofts, Comberb. 465, by Lord Holt.

(*y*) Roskelly v. Godolphin, T. Raym. 483. Com. Dig. Admon. (F.).

(*z*) Bac. Abr. tit. Exor. (B. 1), 2. But see *Re Cope*, 16 C. D.

In an action by an administrator *durante*, &c., it must have been averred that the infant is within age.

Secus, in an action against him.

Plea, by such administrator, if charged as administrator generally.

In the case of an action brought by an administrator *durante minore etate*, he must have averred in the declaration that the infant was still under age (*i.e.*, in all cases since the stat. 38 Geo. III. c. 87, s. 6, that he was within the age of twenty-one years (*a*)); because it is a matter within his conuizance, and which entitles him to the action (*b*). However, the defendant must have taken advantage of this omission by way of plea or demurrer, and could not object to it after he had joined issue with the plaintiff on another point, which admits the continuance of his authority (*c*).

But if an action were brought *against* such an administrator, the plaintiff in his declaration was not obliged to aver that the infant was still under age; for this is a matter more properly within the conuizance of the defendant, and, if his power be determined, he ought to show it (*d*).

It was a good plea in abatement, where a defendant was charged as administrator generally, that administration was granted to him *durante minore etate* only: But it was necessary that such a plea should aver that the infant was still living and under age; for though the defendant was a special administrator at first, yet if that special administration were determined, as by the death of the infant, he might be administrator generally, as the declaration supposes (*e*).

It is submitted that, although the forms of pleading have been altered by the Judicature Acts, the averments above alluded to would still be properly introduced in like cases.

40, 52, as to the distinction between administrator *durante minore etate* granted *ad opus et commodum* of the infant and such administration granted generally. See Sir Moyle Finch's case, 6 Co. 67 *b*, and Touchstone, p. 490.

(*a*) Previous to this statute the administration determined on an infant executor attaining the age of seventeen, which explains what

was said by Treby, C.J., in the case of Beal v. Simpson, 1 Ld. Raym. 408.

(*b*) Piggot's case, 5 Co. 29, *a*.

(*c*) Bac. Abr. Exors. (B. 1), 2.

(*d*) Beal v. Simpson, 1 Lord Raym. 409, by Powell, J.

(*e*) Sparkes v. Crofts, 1 Lord Raym. 265. Bac. Abr. Exors. (B. 1), 3.

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It has been laid down, that if an executor *durante minore etate* has duly administered the assets, and paid over the surplus to the executor of full age, he is not chargeable to creditors, and he may show this matter under a general plea of *plene administravit* (*f*): but that if he has committed a devastavit, he will be liable to creditors (*g*); even though he should obtain a release from the infant, when of full age (*h*).

Liability of such an administrator after administration determined;

to creditors:

However, it is stated by Lord C. B. Gilbert (*i*), that such an administrator is not chargeable at the suit of a creditor after the infant comes of age: but such creditor may sue the infant, who has his remedy against the executor (*k*). And it is said by Lord Hardwicke, in *Fotherby v. Pate* (*l*), that though an administrator *durante minore etate* represents the deceased while his administration subsists, yet when it is determined, he has nothing more to do, nor can he be called to account but by the executor: and that whatever he may do during his administration, he is not liable to any other person.

His Lordship proceeded to observe, that after such an administrator has possessed himself of effects, if he is brought before the Court, without the executor, he may demur for that cause: but as the Court would allow a party to follow assets into any hands, if it were shown by proper charges that he had not accounted to the infant, but fraudulently and by collusion detained any part, there was no doubt but that such a bill might be maintained against an administrator *durante minore etate* (*m*).

It seems clear that an administrator *durante minore etate*, who has wasted the goods of the deceased, cannot be charged

(*f*) Anon. 1 Freem. 150. See also *Brooking v. Jennings*, 1 Mod. 174.

Dig. Admon. (F.).

(*i*) Bac. Abr. Exors. (B. 1), 2.

(*g*) Bull. N. P. 145, citing *Palmer v. Litherland*, Latch. 160. *Packman's case*, 6 Co. 19, b.

(*k*) See also *Acc. Brooking v. Jennings*, 1 Mod. 175, by Vaughan, C. J.

(*l*) 3 Atk. 603.

(*h*) Anon. 1 Freem. 150. Com.

(*m*) *Ib.* 605.

by a creditor as executor *de son tort*, after the infant has attained his majority; because the administrator at the time had lawful power to administer (n).

to a subsequent administrator:

In *Taylor v. Newton* (o), an administration had been granted to a guardian *pendente minoritate* of a widow, and on her coming of age, she renounced for herself and her only child, an infant, and administration was granted to a creditor, to whom the guardian refused to account: whereupon he was called on by the creditor to give in an inventory and account: The guardian appeared under a protestation, because his administration was expired, and his counsel insisted that he was not liable to account, now his administration was expired: But Sir George Lee decreed him to give in an inventory and account by a day specified, and condemned him in costs.

to the infant when of age.

With respect to the liability of such an administrator to the infant, after he has come of age, it was laid down, that if the administrator wasted the assets, the proper way for the infant to charge him was by action on the case (p). Also by some opinions the infant might bring detinue against him for those goods which he still continued in his possession, or he might oblige him to account in the Spiritual Court (q), but could not bring a writ of account against him at law (r).

If an administration *durante minore etate* be repealed, and another made administrator *durante minore etate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release shall not be any bar to it (s).

(n) *Palmer v. Litherland*, Latch. 160, by Doddridge and Jones, Justices. *Lawson v. Crofts*, 1 Sid. 57.

(o) 1 Cas. temp. Lee, 15.

(p) Bac. Abr. Executors (B. 1), 2. *Lawson v. Crofts*, 1 Sid. 57.

(q) 1 Anders. 34. Com. Dig. Administration (F.), Bac. Abr. Exors. (B. 1), 2.

(r) 1 Anders. 34. Bac. Abr. Exors. (B. 1), 2.

(s) Roll. Abr. Exors. (M.), pl. 3.

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Ch. III. § IV.] *Of Administration pendente lite.*

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It was held that if a man obtained judgment against an administrator *durante minore etate*, and afterwards the executor or administrator came of age, a *scire facias* (t) lay against him, upon the judgment (u).

Liability of
infant on judg-
ment against
administrator.

Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante minore etate* of the executor of an executor is *loco executoris*, and the representative of the first testator (v). Therefore, in an action by a creditor of the original testator, such an administrator is properly charged as the administrator *durante minore etate* of the second executor, and not as the administrator *de bonis non* of the original deceased (w). And he might formerly be sued in the Spiritual Court for a legacy bequeathed by the latter (x).

Administrator
durante minore
etate of execu-
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executor.

SECTION IV.

Of Administration pendente lite.

In case of a controversy in the Spiritual Court concerning the right of administration to an intestate, it seems to have been always admitted, that it was competent to the Ordinary to appoint an administrator *pendente lite*: Yet where the controversy before the Ordinary respected a Will, it was once considered that a grant of this species of administration was utterly void (y). But since the case of *Walker v. Woollaston*, decided in K. B., on error from C. P., Trin. T. 1781 (z), it has been settled, that the Court has the power to grant administration *pendente lite* as well touching an executorship as the right to administration (a).

(t) As to the proceedings now substituted in lieu of *scire facias* by the Judicature Act, 1875, see post, Pt. II. Bk. III. Ch. IX.

(u) *Sparkes v. Crofts*, 1 Lord Rayn. 265.

(v) *Anon.* 1 Freem. 288.

(w) *Norton v. Molyneux*, Hob. 246.

(x) *Anon.* 1 Freem. 286.

(y) *Robin's case*, Moore, 636. *Smyth v. Smyth*, 3 Keb. 54. *Frederick v. Hook*, Carth. 153.

(z) 2 P. Wms. 589.

(a) *S. P. Wills v. Rich*, 2 Atk. 286. *Maskeline v. Harrison*, 2 Cas. temp. Lee, 258.

20 & 21 Vict.
c. 77, s. 70.
Court may
grant adminis-
tration *pen-
dente lite*.

And now by the 70th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted, that "pending any suit touching the validity of the Will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction" (*b*).

(*b*) See *Charlton v. Hindmarsh*, 1 Sw. & Tr. 519, where the Court directed that the administrator should not discharge claims on the deceased's estate until they had passed before the Registrar. The Court has power, under this section, to appoint an administrator *pendente lite* in contested testamentary and administration suits, on the application of a person who is not a party to the suit.

In an administration suit which was likely to be protracted, the Court appointed an administrator *pendente lite*, at the instance of a creditor who was not a party to the suit. *Tichborne v. Tichborne*, L. R. 1 P. & D. 730. In the goods of Evans, 15 P. D. 215.

A suit having been instituted to try the validity of the Will of the deceased, and judgment having been given to establish it, one of the parties appealed from such judgment to the House of Lords. A difficulty having arisen in the Court of Chancery as to the powers of the executors to give a good title to certain leasehold property belonging to the deceased's estate, under the probate and pending

the appeal, the Court ordered the probate to be brought into the Registry, and thereupon that letters of administration *pendente lite* should be granted to the executors. *Wright v. Rogers*, L. R. 2 P. & D. 179.

A married woman under a power executed a Will, and her husband by his Will made her universal legatee and sole executrix. She survived him but did not take probate of his Will nor re-execute her own. Litigation having arisen on the question whether the wife's executors were entitled to a limited or general grant of probate, the Court appointed an administrator *pendente lite* to the estate of the husband, as well as one to the estate of the deceased. In the goods of Dawes, L. R. 2 P. & D. 147.

This case has been followed by *Butt, J.*, in the case of *In the goods of Fawcett*, 14 P. D. 152, where that learned Judge is reported to have said that he was "not altogether satisfied that in that case the attention of the Court had been sufficiently called to the words of the 70th section."

And by stat. 21 & 22 Vict. c. 95, s. 22, "all the provisions contained in the Court of Probate Act, respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act."

21 & 22 Vict.
c. 95, s. 22, to
apply to ap-
peals.

Further, by the Court of Probate Act, 1857, s. 71, it is enacted, that "it shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid, or any other person, to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any Will of such deceased person, by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct" (c).

20 & 21 Vict.
c. 77, s. 71.
Receiver of
real estate pen-
dente lite.

By stat. 21 & 22 Vict. c. 95, s. 21, "It shall be lawful for the Court of Probate to require security by bond in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court, under section seventy-one of 'The Court of Probate Act,' and the Court may, on application made on motion or in a summary way, order one of the registrars of the Court to assign the same to some person to be named by such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof."

21 & 22 Vic.
c. 95, s. 21.
The Court of
Probate may
require secu-
rity from the
receiver of
real estate.

Before granting administration *pendente lite* the Court must be satisfied as to the necessity of such an administrator (d),

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Court must be
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(c) See *Grant v. Grant*, L. R. 1 P. & D. 654, where it was held that the Court has no jurisdiction to appoint a receiver of the real estate of the deceased when there is no suit pending touching the

validity of the Will, *e.g.*, when the only litigation is by petition in reference to the individual appointed executor.

(d) *Young v. Brown*, 1 Hagg. 54. *Bellew v. Bellew*, 34 L. J.

fore granting
administration
pendente lite.

Administration
pendente lite
granted though
receiver ap-
pointed by
Court of
Chancery.

The adminis-
trator must be
an indifferent
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and also as to the fitness of the proposed administrator; or must be placed in a condition to determine between the two (its most usual office upon such occasions), an administrator, that is, being proposed by either party (e). The Court will appoint an administrator *pendente lite* if it is just and proper to do so, although a receiver may have been appointed by the Court of Chancery in a suit pending between the same parties and affecting the same property as the testamentary or administration suit (f).

The later practice of the Prerogative Court was to appoint an administrator *pendente lite* in all cases where the Court of Chancery would appoint a receiver (g).

On the other hand, it is the practice of the Court to decline putting a litigant party in possession of the property, by granting administration pending suit to him, always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties (h).

Administrators *pendente lite* are the appointees of the

P. M. & A. 125. But where the estate of the deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued to be carried on by the surviving partner, the Court will not appoint an administrator *pendente lite* against the wish of the surviving partner, unless a strong case is made that he dealt improperly with the business. Horrell v. Witts, L. R. 1 P. & D. 103. Neither will the Court appoint an administrator *pendente lite* where there is a person named in the Will as executor, whose appointment is not questioned, and who can discharge the duties of such an administrator. Mortimer v. Paull, L. R. 2 P. & D. 85.

(e) Northey v. Cock, 1 Add. 329.

(f) Tichborne v. Tichborne,

L. R. 1 P. & D. 730.

(g) Bellew v. Bellew, 34 L. J. P. & M. 125.

(h) Northey v. Cock, 1 Add. 330. Young v. Brown, 1 Hagg. 54. Stratton v. Stratton, 2 Cas. temp. Lee, 49. However, in Colvin v. Fraser, 2 Hagg. 613, administration *pendente lite* and limited to certain property, was granted by consent, to one of the litigant parties. De Chatelain v. Pontigny, 1 Sw. & Tr. 34. See further, as to the practice relating to the preference or rejection of nominees, Hellier v. Hellier, 1 Cas. temp. Lee, 381. Bond v. Bond, *ibid.* 333, 354. In The Queen's Proctor v. Williams, 2 Sw. & Tr. 353, a person who had been receiver in Chancery of the same estates was, by consent, appointed administrator *pendente lite*.

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Ch. III. § IV.] *Of Administration pendente lite.*

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Court, and are not to be merely considered as the nominees or agents of the several parties on whose recommendation they are selected (i). Therefore, in an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court refused to dispense with such administrators entering into a joint bond (k).

mere nominees
of the parties.

By stat. 20 & 21 Vict. c. 77, s. 72, "the Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court think fit."

20 & 21 Vict.
c. 77, s. 72.

Remuneration
to administra-
tors *pendente*
lite and re-
ceivers.

Although doubts were entertained on the subject before the case of *Walker v. Woollaston* (l), it was settled, that the administrator *pendente lite* might maintain actions for recovering debts due to the deceased (m). So where a person, whether he is heir-at-law or next of kin, or any other man whatsoever, kept possession of the testator's leasehold estate, such an administrator was held entitled to bring ejectments for the recovery of the possession (n). But the nature of the authority conferred by such letters of administration was, before the passing of the Court of Probate Act, merely to collect the effects (o); and his power did not extend either to vest or distribute them (p). Therefore, even to enable him to lodge money in Court, which he was not called upon to do, it was necessary for him to file a bill (q). And he had no authority to pay legacies; though if paid *bonâ fide* he would be allowed for them (r). But now it will be seen that the Court of Pro-

Power of ad-
ministrator
pendente lite :

(i) *Stanley v. Bernes*, 1 Hagg. 221.

(k) *Ibid.*

(l) 2 P. Wms. 576.

(m) *Ibid.*

(n) *Wills v. Rich*, 2 Atk. 286.

Jones v. Goodrich, 10 Sim. 328.

(o) 1 Scho. and Lefr. 254. See

also the observations of Sir H.

Jenner Fust in *Goodrich v. Jones*,

2 Curt. 457.

(p) *Gallivan v. Evans*, 1 Ball & Beatt. 192.

(q) *Ibid.*

(r) *Adair v. Shaw*, 1 Scho. & Lefr. 254: He has no business to construe the Will; he is only to hand over the assets to the person entitled, or to dispose of them pursuant to the directions of a Court of Equity: *Ibid.* 255, 256.

bate Act (s. 70) expressly enacts that he shall have all the rights and powers of a general administrator, other than the right of distributing the residue (s).

Commence-
ment and
termination of
duties of
administrator
pendente lite.

The duties of an administrator and receiver *pendente lite* commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of (t).

Such an administrator is not liable to interest upon a balance in his hands, during the pendency of the action (u).

A receiver
would formerly
have been
appointed by
the Court of
Chancery, not-
withstanding
an administra-
tion *pendente
lite* might be
also obtained ;

During a litigation in the Ecclesiastical Court for probate or administration, the Court of Chancery used to entertain a bill for the mere preservation of the property of the deceased, till the litigation was determined, and appoint a receiver, although the Ecclesiastical Court, by granting an administration *pendente lite*, might have provided for the collection of the effects (v).

but Chancery
Division would
not now
appoint
receiver.

But although the Chancery Division of the High Court of Justice has jurisdiction so to do, it would not now entertain an application for the appointment of a receiver, but would leave the matter to be dealt with by the Probate Division. Thus in *Barr v. Barr* (x), where there was a motion for the transfer to the Probate Division of an action, which had been commenced in the Chancery Division for the appointment of a receiver of the rents and profits of a testator's real estate,

(s) See *ante*, p. 428.

(t) *Taylor v. Taylor*, 6 P. D. 29.

(u) *Gallivan v. Evans*, 1 Ball & Beatt. 191.

(v) Mitf. Pl. 145, 136, 4th edit. *King v. King*, 6 Ves. 172. *Edmunds v. Bird*, 1 Ves. & Beam. 542. *Atkinson v. Henshaw*, 2 Ves. & Beam. 85. *Ball v. Oliver*, 2 Ves. & Beam. 96. *Watkins v. Brent*, 1 Mylne & Cr. 102 (overruling the distinction taken by Lord Erskine in *Richards v. Chave*, 12 Ves. 462). *Wood v. Hitchings*, 2 Beav. 289. Such a suit need

not be brought to a hearing: *Anderson v. Guichard*, 9 Hare, 275. In fact it never is brought to a hearing. But after the litigation is over in the Probate Court, the practice is to discharge the receiver and dispose of the costs. And if it appears that there was no reasonable ground for instituting the suit at all, the Court will order the defendant to pay all the costs, though a receiver has been appointed: *Barton v. Rock*, 22 Beav. 81. S. C., *ibid.* 376.

(x) *W. N.* 1876, p. 44.

Ch. III. § v.] *Of Administration durante absentia.*

pending proceedings in the Probate Division to determine the validity of the Will, Sir George Jessel, M.R., made the order for transfer, and pointed out that multiplicity of proceedings was one of the evils which the Judicature Acts was intended to meet, especially as shown in s. 24, sub-s. 7 of the Act of 1873. And in *Re Ivory* (y), a motion for the appointment of a receiver and an injunction was refused, in an action in the Chancery Division for the administration of the personal estate of an intestate, against the defendant to whom letters of administration had been granted. Indeed, even before the Judicature Act, it was decided that having regard to the extended powers of the Court of Probate under sects. 70 and 71 of the Act of 1857, the Court of Chancery ought not, in cases where an administrator *pendente lite* had been appointed by the Court of Probate, to continue its former practice as to the appointment of receivers pending litigation in the Court of Probate (z).

SECTION V.

Of Administration durante absentia.

If the executor named in the Will, or the next of kin, be out of the kingdom, the Ecclesiastical Courts always had the power, *before probate obtained*, or letters of administration issued, of granting to another a limited administration *durante absentia* (a). In the case of *Clare v. Hedges*, 3 Wm. & M. (b), the Court held clearly that such administration was grantable by law, and that it might be a great convenience to do so; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. So in *Slater v. May*, 3 Ann. (c), where an action was

At common
law before
probate :

(y) 10 Ch. Div. 372.

Exors. (G.).

(z) *Veret v. Duprez*, L. R. 6 Eq.

(b) 1 Lutw. 342.

329. *Hitchen v. Birks*, L. R. 10

(c) 2 Lord Raym. 1071. See

Eq. 471. And see *ante*, p.*ante*, p. 376, as to administration

432 (v).

to the attorney of the next of

(a) See 3 Bac. Abr. 56, tit.

kin; and *ante*, p. 405, as to ad-

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brought by an administrator *cum testamento annexo*, *durante absentia* of the executor, Lord Holt said that it was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minore etate* of an executor, *viz.*, that there should be a person to manage the estate of the testator till the person appointed by him is able. The absence of the executor, or next of kin, to justify such an administration must, it seems, be an absence out of the realm (*d*).

power of such
administrator:

Such an administrator is such a legal representative as to entitle him to assign the leaseholds or other property of the deceased (*e*), and his power differs in this respect from that of an administrator *durante minore etate* (*f*).

after probate
by stat. 38
Geo. III. c. 87.

But when probate was once granted, and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorized to grant new administration on the ground that the executor had left the kingdom. Nor could a Court of Equity interfere by appointing a receiver: because, although when once a person capable of sustaining the character of legal representative had been brought into Court, Equity could, in the case of his insolvency or misconduct, appoint another person to manage the affairs of the testator, and compel his legal representative to permit such person to sue in his name; yet, if the executor went abroad, a Court of Equity could entertain no suit, there being no person to stand in the situation of the testator (*g*). The consequence of this defect of the authority of the Spiritual Court, was

ministration to the attorney of the executor.

(*d*) *Ibid*.

(*e*) *Webb v. Kirby*, 3 Sm. & G. 333. 7 De G. M. & G. 376.

(*f*) See *ante*, p. 423. But see *Re Cope*, 16 C. D. 49, in which case Jessel, M.R., doubts the authority of these limitations on the power of an administrator

durante minore etate.

(*g*) *Taynton v. Hannay*, 3 Bos. & Pull. 30. In the case of the estate of a deceased person who at the time of his death was domiciled within the jurisdiction a writ of summons can now by the order of a Judge be served on an executor out of the jurisdiction. See R. S. C., Order XI., Rule 1.

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that there was no person existing within the jurisdiction of the Courts of Law or Equity duly authorized to appear and collect the debts. To remedy this inconvenience, the statute 38 George III. c. 87 (usually called Mr. Simeon's Act), was passed, whereby after reciting that the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons, where the executor to whom probate of the Will hath been granted is out of the jurisdiction of his Majesty's Courts of Law and Equity, it is enacted, "that at the expiration of twelve calendar months (*h*) from the death of any testator, if the executors or executor (*i*) to whom probate of the Will shall have been granted, are, or is, then residing out of the jurisdiction of his Majesty's Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court, which hath granted probate of such Will, upon the application of any creditor (*k*), next of kin or legatee (*l*), grounded on affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment, stamped only with one five shilling stamp, and

(*h*) The words "at the expiration of twelve months" have been held when compared with the words given in the form of the affidavit in sect. 2, and the grant of administration in the 3rd section, to mean at or after the expiration of that period: In the goods of Ruddy, L. R. 2 P. & D. 330.

(*i*) It will be observed that the statute applies to *executors* only, and therefore administration could not be granted during the absence from the country of an administrator *cum testamento annexo*: In the goods of Harrison, 2 Robert. 184. But now by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, s. 74), the above statute shall apply in like manner to all

cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty's Courts of Law and Equity." The provisions of the above Acts apply to the case of an executor of an executor. In the goods of Grant, 1 P. D. 435.

(*k*) A creditor in Equity, such as the assignee in bankruptcy of an absent administrator indebted to the intestate's estate, is a creditor within the meaning of this section. In the goods of Hammond, 6 P. D. 104.

(*l*) As to the construction of these words, see *post*, p. 437, note (*n*).

Stat. 38 Geo.
 III. c. 87, s. 1.
 If, at the
 expiration of
 twelve months
 from a testa-
 tor's decease,
 the executor to
 whom probate
 is granted shall
 not reside
 within the
 jurisdiction of
 his Majesty's
 courts, a credi-
 tor, &c., may
 obtain special
 administration
 on a 5s.
 stamp.

shall pay no further or other duty to his Majesty, his heirs, or successors."

Sect. 2.
Form of
affidavit.

Sect. 3.
Form of grant.

Statute only
applied to
cases where
proceedings
in equity.

Stat. 21 & 22
Vict. c. 95,
s. 18.

Section 2 provided a form of affidavit to be made by the applicant, which contained an averment that the deponent was desirous of exhibiting a bill in Equity; and section 3 contained a form of grant, limited for the purpose of proceedings in Equity; and it was accordingly held that the statute applied only to cases where there were proceedings in Equity, but stat. 21 & 22 Vict. c. 95, s. 18, extended the operation of stat. 38 Geo. III. c. 87, to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of Law and Equity, "whether it be or be not intended to institute proceedings in the Court of Chancery," and authorized an alteration in the language of the grant, so as to make it apply to grants under the last mentioned Act.

The common administrator's oath is now used in place of the affidavit.

Common ad-
ministrator's
oath substi-
tuted for
affidavit.

Stat. 38 Geo.
III. s. 87.
Sect. 4.

Stock belong-
ing to the
estate of the
deceased may
be transferred
into the name
of the account-
ant-general in
Chancery in
trust for such
purposes as the
Court shall
direct in any
suit.

Section 4 which enabled a Court of Equity to appoint persons, to collect outstanding debts, has been repealed by stat. 42 & 43 Vict. c. 59, s. 2.

Section 5. "And be it further enacted, That it shall be lawful for the accountant general of the High Court of Chancery, or for the secretary or deputy secretary of the Governor and Company of the Bank of England, to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made of, any stock belonging to the estate of such deceased person into the name of the accountant general, in trust for such purposes as the Court shall direct, in any suit in which the person, to whom such administration hath been granted, shall be, or may have been, a party: Provided, nevertheless, that if the executors or executor, capable of acting as such, shall return to and reside within, the jurisdiction of any of the said Courts, pending such suit, such executors or executor shall be made party to such suit, and the costs incurred, by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons or out

Executor
returning to
reside within
jurisdiction of
the Court to be
made a party
in such suit.

of such fund as the Court where such suit is depending shall direct."

This statute applies to the case of an executor resident out of the jurisdiction, and out of the reach of process of her Majesty's Courts of Law and Equity, as, for instance, the case of an executor residing in Scotland (*m*).

Application
of statute.

The stat. 38 Geo. III. c. 87, applied only to cases where there were proceedings in Chancery, but this has been remedied by the stat. 21 & 22 Vict. c. 95, s. 18, by which it is enacted, that the provisions of an Act passed in the 38th year of Geo. III. c. 87, and of the Court of Probate Act, shall be extended to all executors and administrators residing out of the jurisdiction of her Majesty's Courts of Law and Equity, whether it be, or be not, intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to, the passing of the last-mentioned Act, and it shall be lawful to alter the language of the grant prescribed by the first-named statute, so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act (*n*).

Stat. 21 & 22
Vict. c. 95,
s. 18.

When the Probate Court in the exercise of its ordinary jurisdiction grants administration during the absence of an executor or next of kin, before probate, or administration taken out by him, such administration is at an end the moment he returns (*o*). But under the statute of 38 Geo. III.

Effect of the
return of the
executor.

(*m*) *Hannay v. Taynton*, 2 Add. 305.

(*n*) Under these Acts a limited grant of administration with the Will annexed was made to the personal representative of a legatee, as being within the spirit, if not the letter, of the statute of Geo. 3: In the goods of Collier, 2 Sw. & Tr. 444. A similar grant was made to a trustee substituted by the Court of Chancery for an executor who had gone abroad. In the goods of Hampson, L. R.

1 P. & D. 1. Where the applicant is residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3. c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under the 18th section of 21 & 22 Vict. c. 95: In the goods of Ruddy, 2 L. R., P. & D. 330.

(*o*) *Secus*, as to an administration granted, *durante absentid.*, to the attorney of an executor: In the

it was held that the administrator was not appointed for a limited period, but for a limited purpose, *viz.*, to become and be made party to a bill or bills in equity, and to carry the decree or decrees into effect. The suit so instituted was not, therefore, to fall to the ground, and be at an end, by the return of the executor, but to go on, he being made a party in the usual course; and then the temporary administrator might account, have his costs, and be discharged (*p*).

It was held in *Clare v. Hedges* (*q*), that in the case of a common law administration *durante absentia*, if any of the debtors of the deceased paid his debt to the temporary administrator, though it was after the return of the executor or next of kin, yet, if the debtor had no notice of such return, it was a good payment.

Effect of the
death of the
executor.

It was held that when an administrator had been appointed under the statute (38 Geo. III.), if the executor died, the administration did not thereby come to an end, nor the authority of the administrator determine (*r*). There is no provision made in the statute for the death of the executor: but the proper course upon such an event seems to be, that in case of his dying intestate, some person should take out general administration to the original testator, or if the former executor made a Will appointing an executor capable of acting, such executor should obtain probate, so as to represent the original testator; and then such administrator or executor, being considered within the true meaning, though not the strict letter of the statute, may apply to be made a

goods of *Cassidy*, 4 Hagg. 360. *Ante*, p. 407. The power of such an administrator is wholly determined by the death of the executor: *Webb v. Kirby*, 7 De G. M. & G. 377, *ante*, p. 407. *Suwerkrop v. Day*, 8 A. & E. 624.

(*p*) *Rainsford v. Taynton*, 7 Ves. 466. But now, by reason of 21 & 22 Vict. c. 95, sect. 18, the purpose would seem no longer so limited,

and the provisions of the Judicature Acts and Rules prevent an action in any case falling to the ground. See R. S. C. 1883, Ord. XVII., r. 4.

(*q*) 1 Lutw. 342. S. C. cited from MS. in *Walker v. Woollaston*, P. Wms. 579.

(*r*) *Taynton v. Hannay*, 3 Bos. & Pull. 20.

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party to any pending action, and the matter can be dealt with in the same way as if the original executor had returned to this country (s).

In the case of an action brought by an administrator *durante absentia*, appointed independently of the statute, the statement of claim must aver that the executor at the time of the grant of administration was absent, and that his absence continues. If there is an averment of his absence, without saying where, the Court will intend it to be in an absence beyond the jurisdiction (t).

What administrator *durante absentia* must allege in his statement of claim.

In an action on a policy of insurance, brought by an administrator appointed under the statute, evidence was tendered by the defendants of declarations made by the executor, whilst he was executor and before the proceedings had taken place for having the present plaintiff appointed special administrator: But Lord Denman refused to receive the evidence, saying that the acts of the original executor, done by him in that capacity, might be admissible in evidence against the plaintiff, who had succeeded *durante absentia* to the office of executor; but that, in his opinion, the mere declarations of the executor did not stand on the same footing (u).

Admissions of executor not evidence against the administrator *durante minoritate*.

SECTION VI.

Of other Temporary and Limited Administrations.

There are several other instances of temporary administrations, granted as well *cum testamento annexo* as in cases of complete intestacy.

Temporary administrations:

It has already appeared that an executor may be appointed with limitations as to the time when he shall begin his office,

cum testamento annexo:

(s) *Rainsford v. Taynton*, 7 Ves. 1071.

460; and see the judgment of (u) *Rush v. Peacock*, 2 Moo. & Chambre, J., in 3 Bos. & Pull. 34. Rob. 162.

(t) *Slater v. May*, Lord Raym.

as where a man is appointed to be executor at the expiration of five years from the death of the testator (x).

in case of an
executor
limited as to
time:

So the testator may appoint the executor of A. to be his executor: and then if he die before A. he has no executor till A. die (y).

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office, the Court must commit administration limited until there be an executor (z). It is plain, that this will be an administration *cum testamento annexo*, and the appointment made according to the rules connected with that sort of grant (a).

administration
limited till a
Will be trans-
mitted to
England:

So it may be necessary to decree a limited administration till the Will of the deceased can be produced in order to be admitted to probate. Thus where the deceased, a few days before his death, stated that he had made his will whilst in India; and that the same was then remaining there; administration was applied for "limited for the purpose of receiving and investing the interest and dividends due or to become due on certain stock of the deceased, and for receiving and investing the amount of an India Bill, and for otherwise protecting the property of the deceased," "until the last Will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country:" Sir John Nicholl, on the consent of all parties apparently interested, granted the administration, and the learned Judge observed, that the deceased could not be sworn to have died intestate, having, according to his own declaration, left a Will in India: An administration *pendente lite* was out of the question, as no suit in the Spiritual Court was or ever might be pending: nor could there be an administration as *durante absentia* or *minoritate* of an executor; for *non constat* who the executor was: At the same time a long interval must elapse before the Will would be forwarded from India,

(x) *Ante*, p. 199.

(y) *Ante*, pp. 199, 200.

(z) Godolph. Pt. 2, c. 30, s. 5.

(a) See *ante*, p. 399, *et seq.*

in which interval it was material there should be some one to protect and manage the property; and, therefore, the Court complied with the application (*b*).

Where a Will, proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the Court will grant administration limited until the original Will be found, and brought into the registry (*c*).

limited till a
lost Will be
found:

If the executor be disabled from acting, as if he becomes lunatic, or incapable of legal acts, then on the principle of necessity, there shall be a grant of a temporary administration with the Will annexed (*d*). Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his committee, for his use and benefit, during his lunacy (*e*). By the consent, given or implied, of the committee of the lunatic, administration with the Will annexed may be committed to a residuary legatee, during the lunacy of the executor (*f*).

limited during
the incapacity
of the executor
or administrator
or next of
kin, &c.

It was also the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurred, the Ecclesiastical Court required affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed: The Court then granted administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it required sureties in double

(*b*) In the goods of Metcalfe, 1 Add. 343. See also 1 Gibs. Cod. 574, where it is said that, though there be no suit or controversy depending touching the executorship, and though there be an executor, yet, if he does not come in, the Ordinary may grant a temporary administration until the executor comes in and proves the Will.

2 Hagg. 555.

(*d*) Hills v. Mills, 1 Salk. 36. Toller, 99. *Ante*, p. 421. These are termed in 1 Oughton, tit. 219, s. 1, n. (a), "*Litteræ administrationis durante Corporis aut Animi ritio*."

(*e*) In the goods of Phillips, 2 Add. 336, n. (*b*).

(*f*) In the goods of Milnes, 3 Add. 55.

(*c*) In the goods of Campbell,

the amount of the property, and such sureties must have justified (*g*).

Where administration had been granted of an intestate's effects to a creditor for the use and benefit of the widow, a lunatic, on the renunciation of her children; on the death of the creditor, leaving goods unadministered, the widow surviving and still lunatic, the Court refused to grant administration *de bonis non* to a son of the deceased, who had retracted his renunciation; but granted it to him for the use and benefit of the widow, during her lunacy, he giving justifying security to the amount of the goods unadministered (*h*).

In another case (*i*), the deceased died intestate in October, 1826, leaving his widow and several children him surviving: In the following November, administration was granted to his widow, who, in November, 1832, became a lunatic: In May, 1836, the Court was prayed to revoke the administration granted to the widow, and to grant an administration to the son of the deceased: The Court declined to revoke the administration; but granted administration to the son, limited during the lunacy of the widow, the letters of administration theretofore granted to her being first brought in and impounded in the Registry, in order to be re-delivered out in case of her recovery.

(*g*) See *Ex parte Evelyn*, 2 Mylne & K. 4, where the practice was laid down, as above stated, by Lord Brougham, C., from a communication made to him by Dr. Lushington. See also *Evans v. Tyler*, 2 Robert. 134. S. C. 7 Notes of Cas. 305, 306. Administration of the effects of a Jew was granted to the Secretary of the Great Synagogue, for the use and benefit of the next of kin (a Jewess), who was of unsound mind, during her lunacy, her next of kin having been first cited: In

the goods of Joseph, 1 Curt. 907. Administration with the Will annexed *de bonis non* was granted to the executors of a sister, the administratrix, deceased, for the use and benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin: In the goods of Southmead, 3 Curt. 28.

(*h*) In the goods of Penny, 4 Notes of Cas. 659.

(*i*) In the goods of Binckes, 1 Curt. 286.

If an executor, who is also residuary legatee in trust, be incapable, and no committee is appointed, the *cestui que trust* may obtain administration under certain circumstances (*k*). In a case where one or two executors had renounced, and the other was a lunatic under confinement, and there was no committee of her person and estate, the Court refused to grant administration to the residuary legatee, the daughter, during the lunacy of her mother, without the sureties in the bond justifying; no reason being given for the renunciation of the co-executor, nor any obstacle assigned to the formal appointment of a committee, to whom the administration for the use of the widow would regularly be granted (*l*).

Until the year 1824, *In the goods of Phillips* (*m*), no case of an application to the Court to supply a defect in the legal representation of the party deceased, occasioned by the lunacy of one of his several administrators, is believed to have occurred. In that case one of the three administrators, *cum testamento annexo*, was found to be a lunatic under a commission from the Court of Chancery, and committees had been appointed: There was standing in the name of the deceased, in the books of the Bank of England, certain sums, his property; but of which neither the interest could be received, nor the principal stock transferred, as directed by the Will, in consequence of such lunacy: Under these circumstances, the Court directed that upon the letters of administration already granted being brought in by the two sane administrators, and the committees of the third, letters of administration *de bonis non*, &c., should by consent of the said committees, issue *de novo* to the two former administrators only (*n*). On the authority of this decision, the Court ordered, in a case where one of two joint administrators had become imbecile and incapable of acting, that the joint letters of administration, having been brought into the Registry, should be re-

Case of one of several administrators becoming lunatic.

(*k*) In the goods of Crump, 3 1 Hagg. 487.

Phillim. 407. (*m*) 2 Add. 335.

(*l*) In the goods of Hardstone, (*n*) 2 Add. 336.

voked, and special letters of administration granted to the same administrator, without justifying securities (o). On another occasion (p), the deceased had appointed two executors, and probate had been granted to one, with a power reserved of making the like grant to the other : The executor who had obtained the grant became a lunatic, and a transfer of the deceased's stock at the Bank could not, in consequence, be obtained : A double probate was taken by the other executor, and the Court was prayed to revoke the probate granted to the lunatic, it having become inoperative : The Court directed both probates to be brought in, and then revoked them, and granted a fresh probate to the other executor, and therein reserved a power of making a like grant to the lunatic executor, when he should become of sound mind and apply for the same.

Administra-
tion limited to
a particular
subject :

There may also be a grant of administration limited to certain specific effects of the deceased ; and the general administration may be committed to a different person. But it should seem that this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given (q).

if there is an
executor there
can be no ad-
ministrator :

Two administrations may well subsist together when there is no executor : But it should be observed that, regularly, no administration of any sort can be granted when there is an executor appointed ; for he is *universi juris heres* to his testator : Therefore where A. made his Will, and appointed B.

(o) In the goods of Newton, 3 Curt. 428.

(p) In the goods of Marshall, 1 Curt. 297.

(q) In the goods of Watts, 1 Sw. & Tr. 538. In the goods of Somerset, 1 L. R. P. & D. 350. Where a party applying for administration has no direct interest in the personal estate of the deceased, but only as assignee of part of it, the grant must be limited to the particular

fund to which he is entitled. In the goods of Dodgson, 1 Sw. & Tr. 259.

Again the Court granted administration with a Will and codicil annexed to a legatee of trust property belonging to the deceased, limited to such trust property, so far as it was personally bequeathed to him by the codicil. In the goods of Prothero, L. R. 3 P. & D. 209.

his executor, and by deed gave part of his estate to C. : and C. obtained in the Prerogative Court a limited administration to the deed only ; the Judges Delegate set aside the grant of this administration on appeal (r).

It frequently happens that the personal administration of a party deceased is broken, and its revival is necessary merely for the performance of a single act. In such cases, administration *de bonis non* will be granted, limited to that particular object. For instance, when the representatives of a trustee, in whom a term of years or charge was vested, are dead, a limited administration to another trustee is requisite, for the purpose of making an assignment, and will be granted limited accordingly (s). So where a testator leaves the dividends on certain stock in the public funds to a legatee for life, and after his decease, the whole property to another, and makes the legatee for life executor, who dies intestate, administration *de bonis non*, with the Will annexed, may be obtained by the representative of the substituted legatee, limited to the sum in the funds, and the dividends due thereon since the death of the legatee for life (t). So administration with a Will annexed was granted to the joint nominees of two charitable institutions to whom legacies, expectant on life interests, had been bequeathed, but limited to a fund

administration limited to assign a trust term :

to a particular legacy :

(r) *Coswall v. Morgan*, 2 Cas. temp. Lee, 571. See *post*, p. 451.

(s) In cases where the original trustee died testate, it was not the practice of the Prerogative Office to annex the Will to an administration granted for this purpose : In the goods of Fenton, 3 Add. 36, n. (a). It is not sufficient, in order to make out a title to the term, to refer to deeds deducing such title in affidavits : The deeds themselves must be brought into the Registry : In the goods of Keene, 1 Sw. & Tr. 265.

(t) In the goods of Steadman, 2 Hagg. 59. But see in the goods of Watts, 1 Sw. & Tr. 539. *Ante*,

p. 444 (q). On one occasion it appeared that a party had remitted from India a bill of exchange payable to the order of the deceased : The bill was accepted, but, previous to its arrival, the deceased died intestate, and his widow and children renounced administration : A grant was applied for to the nominee of the remitter of the bill, limited to receive and give a discharge to a third party for it : But the Court refused the motion, on the ground that it was in fact an application for a limited administration to be granted to the nominee of a debtor : In the goods of Lord Rivers, 4 Hagg. 355.



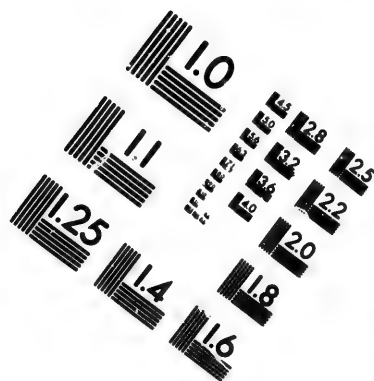
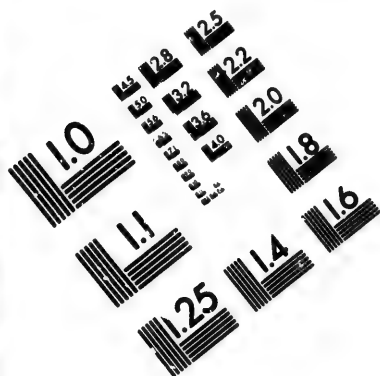
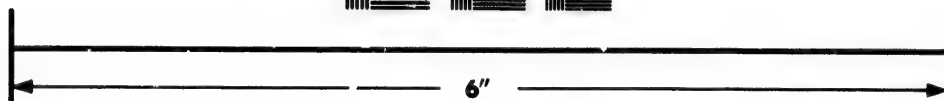
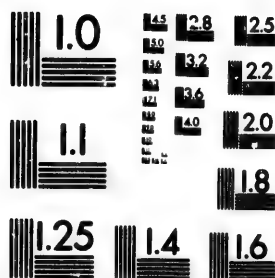


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limited to
proceedings
in Chancery :

appropriated for payment of the legacies ; the parties entitled to a general grant having been cited and not appearing (u).

Again, an administration may be granted, limited to commencing or substantiating proceedings in Chancery (x).

Again, if a debt, by a covenant or obligation binding the heir of the debtor, is demanded in Equity against the real assets in the hands of a devisee, under the statute 3 W. & M. c. 14, (repealed and re-enacted with additional provisions by stat. 11 G. 4 & 1 W. 4, c. 47,) the personal representative of the deceased debtor is generally a necessary party to the suit, as a Court of Equity will first apply the personal in exoneration of the real assets (y). And when there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required (z). In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the Court. This seems to be required rather to satisfy the Court that there are no such assets to satisfy the demand : for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the Ecclesiastical Court, before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be pre-

(u) In the goods of Biou, 3 Curt. 739. Where there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grant extending to their respective interests : Pegg v. Chamberlain, 1 Sw. & Tr. 527.

(x) Woolley v. Green, 3 Phil. 314. Maclean v. Dawson, 1 Sw. & Tr. 425. In the goods of Dodgson, 1 Sw. & Tr. 259. Burdon v.

Morgan, L. R. 2 P. & D. 371. But the appointment of an administrator *ad litem* is now in many cases unnecessary ; for by R. S. C., Ord. XVI., r. 46, the Court may appoint some person to represent the estate of the deceased, or proceed in the absence of any such person. See *post*, Pt. v. Bk. II. Ch. II.

(y) See Mitford Plead. 176, 4th edition. *Post*, Pt. IV. Bk. I. Ch. II. § 1.

(z) Mitf. Plead. 177, 4th edition.

sumed that there are no such assets to be collected, or a general administration would be obtained (*a*).

So where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the Court to proceed to a decision on the claim. And when a right is clearly vested, as a trust term, which is required to be assigned, an administration of the effects of the deceased trustee, limited to the trust term, is necessary to warrant the decree of the Court for assignment of the term (*b*).

But where a testatrix had a power of appointment, and a general probate of her Will of 1829, and codicil thereto, had been granted, the Delegates, reversing a Decree of the Prerogative, held that the Court could not also grant an administration with a Will of 1815, and codicils annexed, limited to become a party to proceedings in Equity, touching the execution of the power by such Wills: but must itself decide whether the Will of 1815 was, under the circumstances, revoked by the Will of 1829, and thereupon grant either a probate of the Will and codicil of 1829 alone, or a probate of these papers and the Will of 1815 and its codicils, as together containing the Will (*c*).

It may be here observed, that in these cases the Court will not grant a *general* administration, but only an administration limited for the purpose of substantiating and carrying on the proceedings in Chancery. On one occasion (*d*) a defendant in a suit in Equity having died intestate, Sir H. Jenner refused to make a *general* grant of administration to a nominee of the plaintiffs in the suit, though the Vice-Chancellor (Sir L. Shadwell) had held (*e*) that an administration

(a) Mitf. Plead. 177, 4th edition. 153.

(b) *Ibid.* 178.

(c) Hughes v. Turner, 4 Hagg.

30. See also Brenchley v. Lynn, 2 Robert. 441. Accord. ante, pp. 328, 329. See also pp. 152,

(d) In the goods of Chanter,

1 Robert. 273.

(e) Davis v. Chanter, 14 Sim, 212.

limited to substantiate proceedings (which had been previously granted) was insufficient, and had directed the cause to stand over to enable the plaintiff to cure the objection by obtaining a general grant.

the estate of the deceased is properly represented in a suit in Chancery by an administrator limited to substantiate proceedings in Equity :

power, &c. of such an administrator :

But the decision of the Vice-Chancellor was afterwards overruled by Lord Cottenham, on a careful consideration of the authorities (*f*) ; and it appears to be now settled, that if the grantee of such limited letters is made a party to the suit, the estate of the deceased is properly represented, so as to enable the Court to proceed in the cause ; and a decree obtained against such an administrator will be binding on any future grantee of general letters of administration (*g*).

With respect to the power and interest of such administrators, a question arose in the case of *Brant v. King* (*h*), before Sir Launcelot Shadwell, V.-C., March 31, 1829: In that case a bill had been filed by persons claiming certain Bank Annuities standing in the name of a trustee, who, pending the suit, died abroad, not leaving any personal representative in this country: Administration was therefore granted by the Prerogative Court of Canterbury, to a person residing in England, "limited for the purpose only to attend,

(*f*) 2 Phill. Ch. C. 545.

(*g*) See *Accord*. *Faulkner v. Daniel*, 3 Hare, 199, 208. *Ellice v. Goodson*, 2 Coll. 4. That is to say, it binds the general administrator when appointed as to the particular question involved in the action, but, if the relief sought for is general administration, a general administrator has always been required: and this rule has in no way been altered by the Judicature Act. Thus in *Dowdeswell v. Dowdeswell*, 9 C. D. 294, although the only object of the suit was to establish the title of the plaintiff as sole next of kin, the Court held that a general administrator of the intestate's

estate was a necessary party to the suit and that the intestate was not sufficiently represented by an administrator *ad litem*. And an administrator *ad litem* of a married woman does not sufficiently represent her separate estate, to enable the Court to decide how far that estate is liable in respect of her acts as trustee: *Shipton v. Rawlins*, 4 De G. & Sm. 477.

(*h*) *Ex relatione* Mr. Wilson, of counsel in the cause. As a general proposition, an administrator *ad litem* represents the estate to the extent of the authority which the letters of administration purport to confer. See *Daniell's Chancery Practice*, 6th ed., 207.

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207.

Ch. III. § VI.] *Of Limited Administrations.*

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supply, substantiate, and confirm the proceedings already had or that may be had in the cause, in the High Court of Chancery, or any other cause which may be commenced, touching the matters at issue in the cause, and until a final decree shall be made therein, and the decree carried into execution, and the execution thereof fully completed" (i). On the petition of the plaintiff, the Vice-Chancellor made an order that the Bank of England should pay to the limited administrator (who had been made a party to the suit by supplemental bill), the dividends in arrear, and that he should pay thereout the costs of obtaining the administration and of the order; and that the limited administrator should transfer (and the Bank permit the transfer) the stock to the Accountant-General in trust in this case: Mr. Horne, for the Bank, suggested a doubt whether an order for payment and transfer could be made in the case of a limited administrator, it not having been the practice of the Bank to pay dividends to, or permit a transfer by, such an administrator: But the Vice-Chancellor thought the application proper, and made the order, observing, that, otherwise a limited administration would be useless (k).

In cases of such limited administrations, the parties entitled to the general grant may take out a *caterorum* representation (l).

caterorum representation.

Further, such limited administrations in strictness ought not to be granted without either the *regular* renunciation (m) of the party entitled, according to the practice of the Court,

Citation of party entitled to the general administration before limited grant.

(i) This appears to be the usual form of letters of administration limited to substantiate proceedings in Chancery. See 2 Phill. Ch. C. 549, 550.

(k) This case was cited and recognised by Lord Cottenham in *Davis v. Chanter*, 2 Phill. Ch. C. 551.

(l) *Harris v. Milburn*, 2 Hagg. 62. But see *In the goods of Currey*, 5 Notes of Cas. 54. *Infra*.

(m) In the goods of *Fenton*, 3 Add. 35, where a renunciation was considered insufficient, because unaccompanied by the original Will of the deceased.

to the general grant; or a citation of such party "to accept or refuse." But under peculiar circumstances this seems to have been sometimes dispensed with (*n*). However, on one occasion (*o*), where a testator died in 1823, and no step was taken to prove his Will till 1846, and in the meantime an administration had been obtained limited to his interest in the remainders of two terms, on an allegation that he was dead intestate, without citation of, or renunciation by, the parties entitled to the general grant; the Court refused a *cæterorum* probate to the sole executrix, and stopped the practice of making such grants of administration for the assignment of terms without citation.

In the case of *Harris v. Milburn* (*p*), the testator died in March, 1827, having made a Will, appointing two executors, and leaving his only two children, daughters, both married, his residuary legatees: A suit in Chancery against the deceased abated by his death: From time to time search was made on the part of the suitor in Chancery, if any Will had been proved, or administration taken, but without success: and in October, 1827, his solicitor wrote to the husbands of the daughters, inquiring whether they would take out administration, and apprising them of the necessity of obtaining a personal representative to the deceased's estate: Similar communications had been made to the solicitor and nephew of the testator; apprising them also of an intended application to the Court; but no answers were returned: A decree with intimation was then extracted, calling upon the daughters to show cause why an administration should not be granted to a nominee of the suitor in Chancery, limited to substantiate

(*n*) *Skeffington v. White*, 1 Hagg. 699. In the goods of Steadman, 2 Hagg. 59. But see *Skeffington v. White*, 2 Hagg. 626. *Ante*, pp. 414, 415. See also In the goods of Watts. 1 Sw. & Tr. 538, where a limited grant was refused, although the parties entitled to a general grant were more than nine

in number, and their residences were widely apart, and their service with a citation would be attended with great difficulty and expense.

(*o*) In the goods of Currey, 5 Notes of Cas. 54.

(*p*) 2 Hagg. 63.

proceedings there: Every reasonable effort was made to serve the decree on the daughters, but the husband of one would not permit access to his wife, and would give no information as to the other sister, whose residence could not be discovered: In December, 1827, the limited administration was decreed, and the proceedings in Chancery were revived: In Easter Term, 1828, the executors, who at last proved the Will, called in the administration, on the ground that the decree was not personally served: But the Court, on petition, directed it to be redelivered out, and condemned the executors in costs; observing that the regular course would have been to take probate *cæterorum*, and if there was any fear of collusion, the executors might have intervened in the Chancery suit.

Finally, an administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another (*q*).

Administra-
tion limited
to a particular
place.

It might happen, under the old practice, that a man dying possessed of goods in two provinces made his Will of the goods only in one of them, and died intestate as to the goods in the other province; and in such case administration might have been granted as to the goods whereof he died intestate (*r*).

(*q*) Bac. Abr. Executor (C. 4). (*r*) Godolph. Pt. 2, c. 30, s. 5.
Toller, 106. See in the goods of *Supra*.
Mann [1801], P. 293

CHAPTER THE FOURTH.

OF THE ADMINISTRATION BOND TO THE ORDINARY.

IN this Chapter it is proposed to consider the security required of an administrator, upon administration being committed to him.

Practice before
the Court of
Probate Act,
1857.

Bond to the
Ordinary by
administrator
under stat. 22
& 23 Car. II.

conditioned

to make a
true inven-
tory, &c. ;

The statute 21 Hen. VIII. c. 5, s. 3, directs the Ordinary to grant administration, "taking surety of him or them to whom shall be made such commission:" and the statute 22 & 23 Car. II. c. 10, s. 1, further provides, that "all Ordinaries, as well as the Judges of the Prerogative Courts of Canterbury and York for the time being, as all other Ordinaries and Ecclesiastical Judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administrations of the goods of persons dying intestate, after the first day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties (a), respect being had to the value of the estate, in the name of the Ordinary, with the condition in form and manner following, *mutatis mutandis*, viz.

"The condition of this obligation is such, that if the within-bounden, A.B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased which have or shall come to the hands, possession or

(a) By the practice of the Prerogative Court of Canterbury, a husband, taking administration to his deceased wife, entered into bond with one surety: In the goods of Noel, 4 Hagg. 208.

"knowledge of him the said A. B., or into the hands and
 "possession of any other person or persons for him, and the
 "same so made do exhibit or cause to be exhibited into the
 "registry of Court, at or before the day
 "of next ensuing:"

"And the same goods, chattels and credits, and all other
 "the goods, chattels, and credits of the said deceased at the
 "time of his death, which, at any time after, shall come to
 "the hands or possession of the said A. B., or into the hands
 "and possession of any other person or persons for him, do
 "well and truly administer according to law."

"And further do make or cause to be made, a true and
 "just account of his said administration at or before the
 "day of : And all the rest and residue of
 "the said goods, chattels, and credits which shall be found
 "remaining upon the said administrator's account, the same
 "being first examined and allowed of by the Judge or Judges
 "for the time being of the said Court, shall deliver and pay
 "unto such person or persons respectively as the said Judge
 "or Judges by his or their decree or sentence, pursuant
 "to the true intent and meaning of this Act, shall limit and
 "appoint:"

"And if it shall hereafter appear, that any last Will and
 "testament was made by the said deceased, and the executor
 "or executors therein named do exhibit the same into the
 "said Court, making request to have it allowed and approved
 "accordingly, if the said A. B. within-bounden, being there-
 "unto required, do render and deliver the said letters of ad-
 "ministration (approbation of such testament being first had
 "and made) in the said Court: Then this obligation to be
 "void and of none effect, or else to remain in full force and
 "virtue."

"Which bonds are hereby declared and enacted to be good
 "to all intents and purposes, and pleadable in any Courts of
 "Justice."

But by the 80th section of the Court of Probate Act (20
 & 21 Vict. c. 77), so much of the above statutes "as requires

to administer
 well and truly:

to make a true
 and just
 account of his
 administra-
 tion:

to deliver and
 pay the residue
 as the judge
 shall appoint:

and to deliver
 the letters, if
 a Will shall
 appear.

Repealed by
 Court of Pro-

I.
 ORDINARY.

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write, entered into
 he surety: In the
 4 Hagg. 208.

bate Act, Stat.
20 & 21 Vict.
c. 77, s. 80.

Sect. 81. Per-
sons to whom
grants of ad-
ministration
shall be made
shall give bond
to the judge.

Sect. 82.
Penalty on
bond.

"any surety, bond or other security to be taken from a
"person to whom administration shall be committed, shall be
"repealed."

And by sect. 81, "Every person to whom any grant of
"administration shall be committed shall give bond to the
"Judge of the Court of Probate to enure for the benefit of
"the Judge for the time being, and, if the Court of Probate
"or, (in the case of a grant from a district registrar) the
"district registrar, shall require, with one or more surety or
"sureties conditioned for duly collecting, getting in and
"administering the personal estate of the deceased, which
"bond shall be in such form as the Judge shall from time to
"time by any general or special order direct; provided, that
"it shall not be necessary for the solicitor for the affairs of
"the Treasury or the solicitor of the Duchy of Lancaster
"applying for or obtaining administration to the use and
"benefit of her Majesty to give any such bond as afore-
"said" (b).

By sect. 82, "Such bond shall be in a penalty of double
the amount under which the estate and effects of the deceased
shall be sworn, unless the Court or district registrar, as the
case may be, shall in any case think fit to direct the same to
be reduced (c), in which case it shall be lawful for the Court

(b) Where, however, adminis-
tration is granted to the Treasury
Solicitor he shall, notwithstanding
that he does not give the bond
which if such administration had
been granted to him as a private
individual he would be required
by law to give, be subject as
regards the administration to the
liabilities and duties imposed by
such bond (Treasury Solicitor Act,
1876), 39 & 40 Vict. c. 18.

And an exactly similar pro-
vision with regard to administra-
tion granted to the Solicitor of the
Duchy of Lancaster is contained in

15 & 16 Vict. c. 3, s. 2, repealed by
39 & 40 Vict. c. 18, s. 9, and Sched. I,
but re-enacted by Sched. II. of
the same Act. See *ante*, p. 372.

(c) In a case where an intestate
left £3,000, and £45 of debt, and
his mother solely entitled in
distribution, the Court granted
administration on the mother
entering into a bond in the amount
of £100 with sureties. In the
goods of Gent, 1 Sw. & Tr. 54.
Where administration was granted
merely to enable a personal repre-
sentative of the deceased to execute
a formal release under a marriage

be taken from a
mitted, shall be
om any grant of
give bond to the
or the benefit of
Court of Probate
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; provided, that
for the affairs of
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3, s. 2, repealed by
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by Sched. II. of
See *ante*, p. 372.
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or district registrar so to do; and the Court or district registrar may also direct that more bonds than one shall be given (d), so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable."

By sect. 83, "The Court may, on application, made on motion or petition in a summary way (e), and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled

Sect. 83.
Power of
Court to
assign bond.

settlement the Court allowed the property to be sworn under £20. In the goods of Stacpoole, 2 Sw. & Tr. 316. In a case where a *cessate* grant was required for £300, the value of two shares, the only property not distributed, the whole estate under the original grant having been sworn under £3,000, the Court accepted a bond in a penalty of £600, being double the value of the two shares. In the goods of Fozard, 3 Sw. & Tr. 173.

Where an estate had been partly administered, and a further bond became necessary, the Court allowed the administrator to take the grant for the amount then due to the estate, and to give security only for double that amount. In the goods of Halliwell, 10 P. D. 198.

And where an estate was being administered in the Chancery Division and an order had been made that each individual share of the estate should be paid directly to the parties entitled, the Court allowed the penalty of the administration bond to be limited to double the amount of the beneficial interest of the applicant. In the goods of Paxton, 14 P. D. 40.

In the goods of Bennison, *ib.*

(d) See In the goods of Weir, 1 Sw. & Tr. 506, where a sum of money had been received by the administrator which made it necessary to re-swear the amount for which administration was taken out, and the Court under this section directed an additional bond, which would, together with the original one, be double the amount under which the estate was to be re-sworn. And in a case where the property was large and the risk small, the Court refused to dispense with sureties to a bond or to lessen the amount secured, but allowed the security to be made up of any number of bonds. In the goods of Earle, 10 P. D. 196.

(e) See In the goods of Jones, 3 Sw. & Tr. 28. *Baker v. Brooks, Ib.* 32. In the goods of Young, L. R., 1 P. & D. 186, where it is decided that the Court will allow an administration bond to be assigned upon being satisfied that the application for the order is made *bond fide* and that a *prima facie* case is made out and that the applicant is the proper person to whom the bond should be assigned.

to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." As to differences existing between the new form of bond, and that given under the Statute of Charles and also as to the practice as established under the old law, see the former editions of this work, and the authorities there cited. Pt. I. Bk. V. Ch. 4.

Creditor who is assignee of bond may sue in his own name.

In the case of *Sandrey v. Michell* (f), the Court of Queen's Bench appears to have been of opinion that the Court of Probate Act made no alteration in the law beyond this that it enabled a creditor on having the bond assigned to him to sue in his own name.

What is a breach of the condition of such bond.

In that case the action was against sureties to a bond conditioned according to the form given by the rule made in pursuance of the 81st section of the Court of Probate Act (g), and which consequently contained, as part of the condition, the terms (not to be found in the bond given under the statute of Charles), that *the administrator shall pay the debts which the deceased owed at his death*: The action was brought by a creditor, to whom the bond had been assigned under sect. 83, and the declaration alleged that assets came to the hands of the administrator, and that he had wasted the same, and did not pay the debt of the plaintiff: The plea was that the only breach of the condition of the bond was the non-payment of the debt to the plaintiff: The replication was, that the administrator had wasted assets of the deceased sufficient to pay the debt: And the Court of Queen's Bench held, that the defendant was entitled to judgment, as the bond could only be enforced for the general benefit of persons interested in the estate of the intestate, and not for the non-payment of a particular debt (h).

(f) 3 B. & S. 405.

(g) See *ante*, p. 454.

(h) The Court gave leave to

amend the declaration, so that the plaintiff should sue as trustee under the 83rd section.

By stat. 21 & 22 Vict. c. 95, s. 15, "bonds given before 21 & 22 Vict. c. 95, s. 15, bonds given before Jan. 11, 1858, are to remain in force."

It was held in *Young v. Hughes* (i), that this enactment had not a retrospective effect, so as to enable the assignee of a bond given to the Ordinary before the passing of the Court of Probate Act to maintain an action commenced by him before the stat. 21 & 22 Vict. c. 95 passed. But although it is plain that such a bond is not assignable under the 83rd section of the Court of Probate Act, yet there seems to be no doubt that, under the 15th section of the Act above stated, a bond given to the Ordinary prior to Jan. 11, 1858 (the day on which the Court of Probate Act came into operation), may, at any time after the 15th section came into operation, be assigned and proceeded upon by the assignee in all respects as if it had been given to the Judge of the Court of Probate subsequently to Jan. 11, 1858 (k).

Where the administration is not within the statute 21 H. VIII. as in the case of an administrator *durante minore etate* with the Will annexed (l), or other grant of administration when the deceased dies intestate, and the Ordinary had taken a bond from the administrator, conditioned for the due payment of debts and legacies, a breach might well be assigned that, though he had more than sufficient to pay all the debts, he has not paid a legacy (m).

(i) 4 H. & N. 76. See also *Young v. Oxley*, 1 Sw. & Tr. 25, where Sir C. Cresswell directed an administrative bond given in the Consistory Court of Chester to be assigned, so that it might be put in suit at Common Law.

(k) 4 H. & N. 84, by Pollock, C. B. It seems to have been the opinion of Martin, B., and Chancellor, B., that the 87th section of the Court of Probate Act shows an intention to transfer to the Court of Chancery the jurisdiction over such a bond: 4 H. & N. 84, 88. *Sed quære de hoc*. See *Bouverie*

v. Maxwell, L. R., 1 P. & D. 272, where it was held that the Court of Probate had no jurisdiction to compel administrators, who had taken out administration in an Ecclesiastical Court, to file inventories and accounts in the Registry of the Court. Such inventories and accounts being by virtue of the 87th section returnable only into the Court of Chancery.

(l) See *ante*, pp. 400, 416.

(m) *Folkes v. Docminique*, 2 Stra. 1137.

Breach of bond given when the administration is not within 21 Hen. VIII.

how many
breaches
might be
assigned :

Where a party had obtained from the Prerogative Court a general order to put the administration bond in suit against the surety, the Court of Common Law, in which the action was brought, could not restrain the party so empowered from suggesting as many breaches as he chose, notwithstanding it may appear, on affidavit, that the order was obtained from the Spiritual Judge solely on one particular ground (*n*).

how far equity
will relieve
against for-
feiture of the
bond :

An administratrix entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time, &c.: The time having elapsed without an inventory being exhibited, a creditor puts the bond in suit in the name of the archbishop, and the administratrix filed her bill for an injunction; which was granted on the terms of her giving judgment in the action, which was to stand as a security for costs at law and in equity (but not for the debt) and amending the bill by submitting to account (*o*).

Stat. 20 & 21
Vict. c. 77,
s. 81.

dispensing
with sureties.

It must be observed that under the 81st section of the Court of Probate Act (*p*) the Court has power to dispense with sureties altogether (*q*).

(*n*) *Archbishop of Canterbury v. Robertson*, 1 Crompt. & M. 181. See the observations of Sir H. Jenner Fust in *Crowley v. Chipp*, 1 Curt. 460. The defendant cannot plead payment of money into Court as to some of the breaches and performance as to the rest: *Bishop of London v. McNeil*, 9 Exch. 490.

(*o*) *Thomas v. Archbishop of Canterbury*, 1 Cox, 399. See also *Bolton v. Powell*, 2 De G. M. & G. 1, 17.

(*p*) *Ante*, p. 454.

(*q*) For instances where the Court has exercised this power, see *Cleverly v. Gladdish*, 2 Sw. & Tr. 327 where the unadministered estate of a testator had been transferred to the Accountant General of the Court of Chancery

and a bill filed praying for it to be administered by that Court. And in the case of *In the goods of De la Farque*, *ib.* 631, where the administrator was, in consequence of sickness, in great poverty and unable to induce any of his relations or friends to become sureties. In the cases of *Duchy of Cornwall v. Canning*, 5 P. D. 114, and *In the goods of Cope*, 15 P. D. 107 the Court dispensed with sureties. But in *Jackson v. Jackson*, L. R., 1 P. & D. 12, the Court declined to dispense with justifying sureties although a Receiver had been appointed by the Court of Chancery.

So in a late case of *In the goods of Paxton*, 14 P. D. 40, the Court refused to dispense with justifying sureties, as being contrary to its

erogative Court a
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suit in the name
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Duchy of Cornwall
P. D. 114, and In
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ensed with sureties.
v. Jackson, L. R.,
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Court of Chancery.
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P. D. 40, the Court
ense with justifying
ing contrary to its

In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court will not dispense with such administrators entering into a joint bond (r).

If the administration be committed to a person out of England, it is requisite that the sureties to the bond shall be resident within the kingdom (s).

When this rule was established the assignee of the bond could not have served the sureties out of England with process. But since the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 18, service of a person abroad may be effected. And the rule has consequently been relaxed (t).

Where there has been an administration *pendente minore etate*, and the minor coming of age takes upon himself the

Bond by administrator *pendente lite*.

Administration bond when administrator is out of England.

Whether in such case the sureties must be resident within the kingdom.

Administration bond when minor comes of age.

practice, but, under the circumstances, as the estate was being administered in the Chancery Division, the Court allowed the security to be limited to twice the amount of the applicant's beneficial interest. And see In the goods of Cormack [1891], P. 151. Askew v. Askew, *ib.* 174.

The Court will not dispense with sureties by reason of the property being large and the risk small. In the goods of Earle, 10 P. D. 196. In the goods of McGowan, 10 P. D. 197. It should be observed that the Court has no power to dispense with the bond: In the goods of Powis, 34 L. J., P. & M. 55.

(r) Stanley v. Bernes, 1 Hagg. 221. But see sect. 83 of the Court of Probate Act, *ante*, pp. 455, 456.

(s) In the goods of O'Byrne, 1 Hagg. 116. See Cambiaso v. Negrotto, 2 Add. 439, as to bonds on grants of administration to foreigners.

(t) In the goods of Reed, 3 Sw.

& Tr. 439. In the goods of Fernandez, 4 P. D. 229. But it is still maintained as to sureties resident in Scotland; for the Common Law Procedure Act, s. 18, excepted places in Scotland or Ireland: Herbert v. Sheill, 3 Sw. & Tr. 479, overruling In the goods of Ballingall, *ibid.* 444, in note. However, in the later case of In the goods of Houston, L. R., 1 P. & D. 85, the Court accepted sureties to an administration bond resident in Scotland, on the ground that the case was one in which greater latitude might be allowed, as the deceased had no creditors and the administrator was the only person beneficially interested in the estate. The procedure as to service of process out of the jurisdiction is now governed by R. S. C. 1883, Order XI., which has taken the place of the provisions of section 18 of the C. L. P. Act, 1852, referred to above. As to the exception of Scotland and Ireland, see Order XI., r. 2.

Justification of
sureties to the
bond :

administration, he is obliged to give security to the same amount that the administrator did in the first instance (u).

Justifying securities to the administration bond are called for at the Court's discretion according to the circumstances of each case ; except that there is one general rule, that where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required (x). Where the securities are required to justify in the ordinary course of practice, the Court will not dispense with this, even partially, but under very special circumstances (y).

Where the application that the sureties may be directed to justify, is made on behalf of a next of kin, the Court feels bound to grant it ; but it may be sufficient for the sureties to justify in respect of the share of the party excluded from the administration (z).

next of kin
administrator
*cum testamento
annezo* :

Where administration *cum testamento annezio* was granted to the next of kin, on the ground of there being no executor or residuary legatee who survived the testator, the party, who had unsuccessfully claimed the administration derivatively from the residuary legatee, prayed that the sureties to the administration bond of the next of kin might be compelled to justify ; but the Court rejected the application, as contrary to the established practice (a).

residuary
legatee :

But a residuary legatee for life, taking administration with the Will annexed, may be compelled to procure justifying sureties (b). On another occasion, the Court refused, on re-

(u) *Abbott v. Abbott*, 2 Phillim. 578.

(x) *Aitkin v. Ford*, 3 Hagg. 194, n. (a) : In the goods of Milligan, 2 Robert. 108. The Court will not dispense with this rule in favour of the official assignee of a deceased bankrupt : *Belcher v. Maberly*, 2 Curt. 629.

(y) *Howell v. Metcalfe*, 2 Add. 348. The mere fact that a receiver of the personal estate had

been appointed by the Court of Chancery according to the practice before the Judicature Act, was no ground for the dispensation : *Jackson v. Jackson*, L. R., 1 P. & D. 12 ; 35 L. J., P. & M. 3.

(z) *Coppin v. Dillon*, 4 Hagg. 376.

(a) *Taylor v. Diplock*, 2 Phillim. 280.

(b) *Friswell v. Moore*, 3 Phillim. 139.

ity to the same
instance (u).

a bond are called
the circumstances
rule, that where
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justifying securities
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son, L. R., 1 P. &
P. & M. 3.
Dillon, 4 Hagg.

Diplock, 2 Phil-
Moore, 3 Phil-

nunciation of a co-executor, to grant administration with the Will annexed, without justifying securities, to the daughter, the residuary legatee, during the lunacy of her mother, the other executor and residuary legatee in trust (c).

Administration *de bonis non* with a Will annexed, in which legatee :
was no executor, was granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee ; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or (on a proxy of consent from the other) beyond the joint interests, and an affidavit of no outstanding debts being made (d).

A husband, resident abroad, was directed, on the applica- husband resi-
tion of creditors, to give justifying security resident within dent abroad :
the jurisdiction, on taking a grant of administration to his wife (e).

There may also be justifying sureties required to the ad- temporary ad-
ministration bond in cases of temporary general administra- ministrator :
tion ; as *durante minore etate* (f) ; or on a grant to a widow, where there is a minor daughter entitled in distribution, limited till a last Will is found (g) ; or on a grant to the use and benefit of a lunatic, pending the lunacy (h).

Under the old practice if the Court decreed a general grant, under the old
but, under special circumstances, required the sureties to practice the
justify only as to a *part* of the property, it would not allow Court would
separate bonds, so that *other* securities than those who *justi-* not allow *sepa-*
fied in the requisite amount entered into the *common* rate bonds.
administration bond, in the double amount of the *whole* property (i).

In an administration *pendente lite* limited to recover certain

- (c) In the goods of Hardstone, 350.
1 Hagg. 487. See also, In the goods of Williams, 3 Hagg. 217. (g) In the goods of Campbell, 2 Hagg. 555.
(d) Pickering v. Pickering, 1 Hagg. 480. (h) *Ante*, p. 441.
(e) In the goods of Noel, 4 Hagg. 307. (i) Howell v. Metcalfe, 2 Add. 348. But see now s. 82 of the Court of Probate Act, *ante*, p. 454.
(f) Howell v. Metcalfe, 2 Add.

sums, and granted jointly to the nominees of the two parties in the suit, the Court would not dispense with such administrators entering into a joint bond (*k*).

Administration bond by attorney of next of kin.

Where a person is authorised by a simple power of attorney to take out administration as agent for the use and benefit of a party entitled to administration who is abroad, the Court will only grant administration to the agent on the same terms as it would have granted it to the party himself, and, therefore, will not alter the usual conditions of the administration bond or the terms of the ordinary administration oath (*l*).

Administration bond by a third person for a wife entitled to administration when the husband refuses to execute one. Third person allowed to file affidavit of increase and execute bond.

In a case decided before the Married Women's Property Act, 1882, the husband of a married woman who was entitled to administration refused to execute the administration bond or to assist in her obtaining the grant, and the Court granted administration to her and allowed a third person to execute the bond (*m*). Where the administrator was in Japan, and a considerable sum became payable to the estate of the deceased under an order of the Court of Chancery, the Court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the increased duty (in the place of the administrator), with two sureties on the understanding that as soon as possible the administrator should execute a similar bond (*n*).

Court will not discharge

The Court will not discharge the original sureties to an

(*k*) *Stanley v. Bernes*, 1 Hagg. 221. See further as to the practice respecting the sureties to administration bonds, *Bond v. Bond*, 1 Cas. temp. Lee, 429. *Allen v. Allen*, 2 Cas. temp. Lee, 244. See further as to the practice with respect to suing on administration bonds, *In the goods of Irving*, L. R., 2 P. & D. 658.

(*l*) *In the goods of Goldsborough*, 1 Sw. & Tr. 295.

(*m*) *In the goods of Sutherland*,

4 Sw. & Tr. 189. Since the Married Women's Property Act, 1882, however, when a married woman is administratrix, it is not necessary that her husband should join in the administration bond; the husband incurring no responsibility, and the grant conferring no benefit upon him. *In the goods of Ayres*, 8 P. D. 168.

(*n*) *In the goods of Ross*, 2 P. D. 274.

administration bond and allow other sureties to be substituted for them (o).

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sureties.

It remains to mention such rules of the Court of Probate as apply to administration bonds.

By rule 38, P. R. (Non-contentious Business), "Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95; but in no case are they to be attested by a proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix" (p).

Rule 38, P. R.
(Non-contentious Business). Who are to attest the bond.

By rule 39, "In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant (q). The alleged value of such property is to be verified by affidavits if required."

Rule 39.
Number of sureties and amount of bond.

By rule 40, "The administration bond is, in all cases of limited or special administrations, to be prepared in the registry."

Rule 40.
Preparation of bond.

By rule 41, "The registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons" (r).

Rule 41.
Sureties to be responsible persons.

(o) In the goods of Stark, L. R., 1 P. & D. 76.

(p) But this rule may be dispensed with: In the goods of Parker, L. R., 1 P. & D. 301.

(q) As to reducing the penalty of the bond, see *ante*, p. 454, and as to dispensing with sureties, see *ante*, pp. 454, 458.

(r) The "Guarantee Society" has been accepted by the Court as surety to a bond given by an administrator pending suit, even though the directors do not by bond render themselves personally liable. *Carpenter v. Queen's Proctor*, 7 P. D. 235.

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BOOK THE SIXTH.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION, AS LONG AS THEY ARE UNREVOKED:—OF THE REVOCATION OF THEM, AND OF THE CONSEQUENCES THEREOF.

CHAPTER THE FIRST.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION AS LONG AS THEY REMAIN UNREPEALED.

As to what facts probate, &c., is conclusive.

IT is a legal consequence of the exclusive jurisdiction of the Probate Division in deciding on the validity of Wills of personality, and granting administration, that its sentences pronounced in the exercise of such exclusive jurisdiction, should be conclusive evidence of the right directly determined (*a*). Hence a probate, even in common form, unrevoked, is conclusive both in the Courts of Law and of Equity (*b*), as to the appointment of executor, and the validity and contents of a Will, so far as it extends to personal property: and it cannot be impeached by evidence even of fraud (*c*).

Therefore, it is not allowable to prove that another person was appointed executor, or that the testator was insane, or

(*a*) 1 Phil. Ev. 343, 7th edit.

(*b*) *Allen v. Dundas*, 3 T. R. 125. *Griffiths v. Hamilton*, 12 Ves. 298. *Jones v. Jones*, 3 Meriv. 171. All the cases on this subject will be found collected and commented on with great ability in *Hargrave's Law Tracts*, p. 459, *et seq.* A probate obtained, as a matter of course, on a Scotch

confirmation, under stat. 21 & 22 Vict. c. 56 (see *ante*, p. 298), stands on the same footing; and it makes no difference that proceedings are pending in Scotland for a reduction of the confirmation: *Cumming v. Fraser*, 28 Beav. 614.

(*c*) *Griffiths v. Hamilton*, 12 Ves. 307. *Ante*, p. 38, n. (*m*). *Post*, pp. 472, 473.

that the Will of which the probate has been granted was forged: for that would be directly contrary to the seal of the Court in a matter within its exclusive jurisdiction (*d*). So the probate of a Will conclusively establishes in all Courts that the Will was executed according to the law of the country where the testator was domiciled (*e*).

In short, without the *constat* of the Court of Probate, no other Court can take notice of the rights of representation to personal property; and when that Court has, by the grant of probate or letters of administration, established the right, no other Court can permit it to be gainsayed (*f*).

By the Court of Probate Act (20 & 21 Vict. c. 77, s. 75), Stat. 20 & 21 Vict. c. 77, s. 75.
 "After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in, or affected by, such grant of administration, until such administration shall have been recalled or revoked."

So, in *Bouchier v. Taylor* (*g*), it was decided by the House After sentence of Ecclesiastical

(*d*) *Noel v. Wells*, 1 Sid. 359.

(*e*) *Whicker v. Hume*, 7 H. of L. 124. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country, but it proves nothing else: *Whicker v. Hume*, 7 H. of L. 124. Therefore the fact that probate of a Will has been granted by an English Court is not conclusive that the testator was domiciled in England, even though the Will is in such form that, though admissible as a testamentary instrument according to the English law, it would not have been entitled to probate, according to the law of the country of the true domicile of the deceased: *Bradford v. Young*, 26 C. D. 656; 29 C. D. 617. And it would seem from the decision of the House of Lords in *Concha v. Concha*, 11 App.

Cas. 541, that even though the facts had been such that the Court in granting probate decided, and necessarily decided, the question of domicile (which was not the case in *Concha v. Concha*), yet the judgment would not have bound everybody as a judgment *in rem*, but would leave open the question of domicile, so far as regards the distribution of the residuary sum of the testator's property after all the creditors, who had a right to come upon it, had been sufficiently paid off.

(*f*) *Attorney-General v. Partington*, 3 Hurl. & C. 204. *Re Ivory*, 10 C. D. 372.

(*g*) 4 Bro. C. 708, Toml. edit. See Hargrave's Law Tracts, pp. 472-476. The case of *Bouchier v. Taylor* was much discussed in the House of Lords in *Concha*

cal Court determining who are next of kin no issue can be directed by Court of Chancery to try such question.

Payment to executor who has obtained probate of forged Will is good discharge of debtor.

of Lords that after a sentence in the Ecclesiastical Court determining the question who are the next of kin of the intestate, and granting letters of administration to the person found to be such next of kin, the Court of Chancery is precluded from directing any issue to try that question. And this decision was held by Lord Lyndhurst in *Barr v. Jackson* (h) (reversing the decree of Knight Bruce, V.-C.) (i), to be a binding authority for the proposition, that if the sentence of the Ecclesiastical Court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in the Court of Chancery, between the same parties, for distribution (k).

Upon this principle it was decided, that payment of money to an executor, who has obtained probate of a forged Will, is a discharge to the debtor of the deceased, notwithstanding the probate be afterwards declared null in the Ecclesiastical Court, and administration be granted to the intestate's next of kin (l): for if the executor had brought an action against

v. Concha (ubi sup.), and distinguished on the ground, 1stly, that the question as to which the residuary legatee under the Will of Alice Merchant was held bound by reason of the decision against his predecessor in title, was the very point which had to be decided by the Spiritual Court in the litigation between Dr. Bouchier and the executors of Alice Merchant: and 2ndly, that at that time the Spiritual Court was a Court of distribution as well as a Court merely to determine the question of the validity of the testament, and to grant probate or administration.

(h) 1 Phill. C. C. 582.

(i) 1 Y. & Coll. C. C. 585.

(k) So long as letters of administration remain in force they are conclusive evidence that the

administrator to whom as next of kin they were granted, is in fact such next of kin. *Re Ivory*, 10 C. D. 372, per Lush, J., 374. In *Long v. Wakeling*, 1 Beav. 400, where A. B. being entitled to a fund in Court, died, and administration was granted to a person, as "the natural and lawful sister" of A. B.; and it appeared from the proceedings in the cause, that A. B. was illegitimate, the Court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of Court without notice to the Crown.

(l) *Allen v. Dundas*, 3 T. R. 123. See also *Prosser v. Wagner*, 1 C. B., N. S. 289, and stat. 20 & 21 Vict. c. 77, s. 77, post, p. 500.

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the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed: and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it (*m*).

When there is a question, whether particular legacies given by a Will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instruments (*n*). In such a case, if the probate has been granted, *as of a Will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper (*o*).

The probate is also conclusive as to every part of the Will in respect of which it has been granted: for example, in *Plume v. Beale* (*p*), where an executor proved a Will of personal property, and then brought a bill in equity to be relieved against a particular legacy, on the ground of its having been interlined in the Will by forgery, Lord Cowper dismissed the bill with costs, observing, that the executor might have proved the Will in the Ecclesiastical Court, with a particular reservation as to that legacy (*q*).

But though Courts of Equity were bound to receive, as testamentary, a Will, in all its parts, which had been proved in the proper spiritual Court, yet Courts of Equity, in certain cases, affect with a trust a particular legacy or a residuary bequest, which has been obtained by fraud (*r*). For instance, if the drawer of a Will should fraudulently insert his own

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In what cases
a Court of
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(*m*) *Allen v. Dundas*, 3 T. R. 129. Where, however, a sum of stock was standing in the name of a testatrix, which her executors overlooked, and, the dividends remaining unclaimed, the stock was transferred to the National Commissioners; and afterwards, one Sanders procured a probate in the name of T. Hunt, of a forged Will of the testatrix, and obtained a transfer; it was held by Lord Langdale, M.R., that the probate

did not authorize a payment to Sanders, and that a party giving faith to the probate was bound to see that the person claiming under it was a real T. Hunt: *Ex parte Jolliffe*, 8 Beav. 168.

(*n*) See *infra*, Pt. III. Bk. III. Ch. II. § VIII.

(*o*) *Baillie v. Butterfield*, 1 Cox, 392.

(*p*) 1 P. Wms. 388.

(*q*) See *ante*, p. 315 (*t*).

(*r*) *Mitf. Plead.* 257, 4th edit.

name, instead of that of a legatee, he would be considered in equity as a trustee for the real legatee (s). And it has never been thought that Courts of Equity, by declaring a trust, in such cases, infringed upon the jurisdiction of the Ecclesiastical Courts (t).

Again, although it is now settled that a Will cannot, either before or after probate, be set aside in equity, on the ground that the Will was obtained by fraud on the testator, yet where probate has been obtained by fraud on the next of kin, Equity interferes and either converts the wrongdoer into a trustee, in respect of such probate, or obliges him to consent to a repeal or revocation of it in the Court in which it was granted (u). Thus in *Barnesly v. Powell* (v), the bill sought to be relieved against a paper writing, purporting to be the

(s) *Marriot v. Marriot*, 1 Stra. 666. Mitf. Pl. 258, 4th edit. See *post*, p. 473, note (f). So in *Segrave v. Kirwan*, 1 Beat. 157, the executor, who was a barrister, had himself prepared the Will, the rule of law at the time being, that the executor was entitled to the residue unless otherwise disposed of, or unless a legacy was bequeathed to him. (See *post*, Pt. III. Bk. III. Ch. V. § II.) And Sir A. Hart held that it was the duty of the executor to have informed the testator that such was the rule, and that he could not be allowed to profit from this omission, but must be decreed to be a trustee for the next of kin. See also *Bulkeley v. Wilford*, 2 Cl. & F. 102. S. C. 8 Bligh, 111. It was held by Sir J. Stuart, V.-C. (notwithstanding the case of *Allen v. McPherson*, *post*, p. 472, *et seq.*) that the Court, under its equitable jurisdiction has authority to declare an attorney a trustee for the heir at law and next of kin of real

and personal estate given him by a Will prepared by himself, where he has improperly taken advantage of the testator's ignorance, or allowed him to remain under a mistaken impression which influenced the gift: *Hindson v. Weatherill*, 1 Sm. & G. 609. But this decision was reversed on appeal, on the facts, the Lords Justices declining to give any opinion on the law of the case: Lord Justice Turner, however, distinguished it from *Segrave v. Kirwan*, observing that in that case the testator had no intention to benefit Kirwan the counsel: 5 De G. M. & G. 361. See also *Walker v. Smith*, 29 Beav. 394.

(t) 1 Stra. 673. Gilb. Eq. Rep. 209. Fonbl. Eq. Bk. 4, Pt. 2, c. 1, s. 1, n. (a).

(u) Mitf. Pl. 357, 4th edition.

(v) 1 Ves. Sen. 119, 284, 287. 2 Roper, Leg. 688, 3rd edition; recognized by Lord Cottenham in *Price v. Dewhurst*, 4 M. & Cr. 83.

Will of the plaintiff's father, under which the defendant, Mansel Powell, claimed, and which was not without evidence to support it, although there was strong suspicion of forgery : It was also sought to be relieved against several acts of the plaintiff since his father's death ; such as the decree of the Court of Exchequer against him and a sentence in the Prerogative Court, wherein the plaintiff's consent to establish that Will by a probate was obtained, and a conveyance and assurances made by him : Lord Hardwicke, C., directed an issue, with a special direction on the decretal order, to know on what foundation the jury went, if they found against the Will, whether upon forgery, or any particular defect in the execution ; and his Lordship, after making some observations, with respect to the relief against the decree of the Court of Exchequer, proceeded to remark, "As to the sentence of the Prerogative Court, as at present advised, that will create no difficulty if the Will is found forged ; for then the plaintiff's consent appearing to have been obtained by the misrepresentation of that forged Will, that fraud infects the sentence ; against which the relief must be here : This is not absolute, but only to show the tendency of my opinion upon the equity reserved after the trial ; for I should not scruple decreeing the defendant, who obtained that probate, to stand as a trustee in respect of the probate ; which would not overturn the jurisdiction of that Court." After a very long trial by a special jury, a verdict was brought in against the Will, with an indorsement that it was grounded on forgery, and not on any defect in the execution. Upon the equity reserved, Lord Hardwicke admitted that undoubtedly the jurisdiction of the Wills of personal estate belonged to the Ecclesiastical Court, according to which law it must be tried, notwithstanding the Will is found forged by a jury at law, upon the examination of witnesses ; but there was a material difference between the Court of Chancery taking upon itself to set aside a Will of personal estate on account of fraud or forgery in obtaining or making that Will, and taking from the party the benefit of a Will established in the Ecclesiasti-

cal Court by his fraud, not upon the testator, but the person disinherited thereby: That fraud in obtaining a Will infected the whole; but the case of a Will, of which the probate was obtained by fraud on the next of kin, was of another consideration (x): That, in the case before him, the plaintiff had given a covenant to the defendant to do all acts which Powell should require of him; in consequence of which, a special proxy under hand and seal was obtained from him, confessing the allegations; upon which sentence was pronounced of probate to the defendants, the executors: The probate depended on that deed: and it was, therefore, proper for the Court to inquire, and set it aside for fraud, if proved; and that was the ground of jurisdiction in the Court of Chancery, distinct from the Will itself, and abstracted from the general jurisdiction of the Ecclesiastical Court to determine of a Will of personal estate: On the whole circumstances of the case, his Lordship decreed, that the defendants should consent (y), in the Ecclesiastical Court, the next term, to a revocation of the probate, and that, after such revocation, the defendants should have a fortnight's time to propound the paper writing in the Ecclesiastical Court; on failure of which, his Lordship said he would compel the defendants to consent to the granting administration to the plaintiff: and his

(x) The distinction here taken by Lord Hardwicke was recognized by Lord Alsey in *Meadows v. Duchess of Kingston*, Amb. 764.

(y) Even if there had been no such decree and no consent by the defendants, it would seem that in a suit for revocation the defendants would have been estopped from denying that the Will was a forgery. Thus in *Priestman v. Thomas*, 9 P. D. 210, in an action in the Probate Division, T. and G. propounded an earlier and P. a later Will. The action was compromised, and by consent verdict

and judgment were taken for establishing the earlier Will. Subsequently P. discovered that the earlier Will was a forgery, and in action in the Chancery Division to which T. and G. were parties obtained the verdict of a jury to that effect and judgment that the compromise should be set aside. In another action in the Probate Division for revocation of the probate of the earlier Will it was held, affirming the decision of the President of the Probate Division (9 P. D. 70), that T. and G. were estopped from denying the forgery.

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Lordship added, "I think I ought to go further; and although I shall not yet decree a trust, yet even now I shall be warranted to decree an account of the personal estate, to be paid into the Bank, for the benefit of the parties entitled, which for security was done in *Powis v. Andrews*; and the present case, from all the ill practice that has been, is stronger than that. This is the better method, to avoid any jealousy of infringing on the Ecclesiastical Court." It being insisted for the plaintiff, that the Court ought to direct no examination of the said paper writing, but grant a perpetual injunction, from the circumstances of its being produced and found with the forged Will, and its reciting a forged deed: his Lordship thought this would be a very good defence in the Ecclesiastical Court, as they were circumstances of suspicion; but that it would be going too far to say, that, because of ill practice in one Will, he should have no right as to another.

The effect of this decision was considered in the case of *Gingell v. Horne* (z). There, after a Will of personality had been proved *per testes* in the Ecclesiastical Court, a bill was filed by the next of kin, alleging that the testator's signature to the Will was obtained when he was not of sound and disposing mind; that his medical attendants were not called as witnesses when the probate was obtained; and that the evidence of the testator's incompetency did not come to the knowledge of the plaintiffs until after the time allowed for appealing from the sentence of the Ecclesiastical Court had expired; and praying that the Will might be declared to have been fraudulently obtained, and that the residuary legatee might be declared a trustee for the plaintiffs: A demurrer to the bill was allowed by Sir L. Shadwell, V.-C.: And his Honour said, he had long considered the law as settled, that there is no method of escaping from the effect of probate, unless in a case like *Barnesly v. Powell*: That in the present case no fraud was practised on the plaintiffs in

(z) 9 Sim. 539.

obtaining probate; and this bill, therefore, did not afford any such materials for the interference of the Court as there were in *Barnesly v. Powell*, in which Lord Hardwicke made a decree which afforded an opportunity of having the matter reconsidered in the Ecclesiastical Court.

The subject was much discussed in the case of *Allen v. Macpherson (a)*. There the testator had by his Will and subsequent codicils bequeathed considerable property to the plaintiff, and made also other bequests to other relatives: he afterwards, by a further codicil, revoked these bequests, and in lieu of them made a small pecuniary provision for the plaintiff: The bill alleged that this codicil was obtained by false and fraudulent representations, made by an illegitimate son of the testator, acting in confederacy with the defendant, his daughter and residuary legatee, as to the character and conduct of the plaintiff: In the Ecclesiastical Court, the plaintiff had unsuccessfully resisted the admission to probate of the revoking codicil, on the ground that it had been obtained by undue influence: And the bill further stated that the appellant was confined in that Court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill or into any other case solely relating to the parts of the codicil which affected only the appellant: To this bill the defendant demurred: Lord Langdale, M.R., overruled the demurrer, being of opinion that, by analogy to former decisions, as the bill alleged that the revocation had been procured by the fraud of the defendant, the Court of Chancery had jurisdiction to deprive her of the benefit of it, and to declare her to be a trustee of that to which the law entitled her for the benefit of the person to whose prejudice the fraud was practised (b). But this decision was reversed by Lord Lyndhurst, C., on appeal, and his Lordship relied on the distinction taken by Lord

(a) 5 Beav. 469. 1 Phil. C. C. 133. 1 H. of L. 191. (b) 5 Beav. 469.

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Hardwicke (as above stated), in *Barnesly v. Powell*, and recognised by Lord Apsley in *Meadows v. The Duchess of Kingston* (c), between fraud on the testator and fraud upon the person disinherited thereby: His Lordship further relied on *Kerrich v. Bransby* (d), as a decision of the House of Lords established not merely that a Will cannot be set aside in Equity for fraud (e), but further, that the Court of Chancery has no jurisdiction to declare the fraudulent legatee a trustee for the party defrauded. And this decision was afterwards affirmed on appeal to the House of Lords; their Lordships holding that the Ecclesiastical Court had jurisdiction to refuse and ought to have refused probate of that part of the codicil which affected the appellant, because, giving credit to the facts stated by the bill and admitted by the demurrer, that part of the codicil was not the will of the testator, having been obtained by a fraud practised on him; but that the proper course would have been to appeal to the Privy Council in order to set the matter right, and not to file a bill in Equity, which was, in effect, an attempt to review the decision of a Court of Probate by the Court of Chancery (f).

(c) Ambl. 762. *Ante*, p. 470, note (z).

(d) 7 Bro. P. C. 437. *Ante*, p. 464, n. (c).

(e) But Lord Abinger, C.B., in his judgment in *Middleton v. Sherburne*, 4 Y. & Coll. Exch. C. 358, argued with much pains that in *Kerrich v. Bransby*, the bill was dismissed on the merits, and that the case is, therefore, no authority for the proposition that a Will cannot be set aside in equity for fraud.—That, however (observed Lord Lyndhurst, in *Allen v. Macpherson*, 1 Phil. C. C. 146), has not been the understanding of the profession, and Lord Hardwicke, who probably was acquainted

with the history of the case, expressly states in *Barnesly v. Powell*, that it was decided on the question of jurisdiction. And Lord Eldon, in *Ex parte Fearon*, 5 Ves. 633, 647, observed that it was determined in *Kerrich v. Bransby* that the Court of Chancery could not take any cognizance of Wills of personal estate as to matter of fraud.

(f) 1 H. of L. 191. Lords Lyndhurst, Brougham, and Campbell were of opinion that the decree should be affirmed, *dissentientibus* Lords Cottenham, C., and Langdale, M.R. Lord Lyndhurst, in the course of delivering his opinion, observed as to the case

Further, the Court of construction, may, under particular circumstances, so construe an instrument, of which probate has been obtained, as to render it ineffectual. Thus in *Gawler v. Standerwick (g)*, a paper was proved in the Spiritual Court as a Codicil of the testator, which was signed by the executors and others, and purported to be an acknowledgment of what *they understood* to be the will of the testator, when he was unable to speak, in favour of certain legatees; and a bill having been filed in equity, a question was raised whether they were entitled to their legacies under this paper proved as a codicil: Sir Lloyd Kenyon, Master of the Rolls, said that, as it had been proved in the Spiritual Court, he was bound to receive it as a testamentary paper; but having so done, *the Court of Equity was to construe it*: Now the effect of this codicil was only that the parties *understood* it to be the Will of the testator that the asserted legatees should have legacies, and the heir promised to perform this; but the Court could not convert the promise of the heir into the Will of the testator; and his Honour, therefore, thought that this paper, though testamentary, yet operated nothing.

Again, in *Walsh v. Gladstone (h)*, the testator had drawn two cheques on his banker in favour of two of his servants, with a direction that the cheques should be presented after his death: about a year afterwards he made a formal Will, in which, among other bequests, he gave an annuity to each

mentioned by Gilbert, C.B., in *Marriot v. Marriot (ante, p. 468, n. (s))*, of the drawer of the Will fraudulently inserting his own name instead of that of the legatee, that if probate were refused in such a case, on account of the fraud, the real legatee would lose his legacy. And his lordship added, that he thought it would be found, on examining the cases in which the House of Lords had

declared a legatee or executor to be a trustee for other persons, that they have been either questions of construction, or cases in which the party had been named as trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. See also *Melhuish v. Milton*, 3 C. D. 27.

(g) 2 Cox, 16.

(h) 13 Sim. 261.

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of the two servants, and the residue of his personal estate to certain other persons, and revoked all former Wills: After his death all the three instruments were admitted to probate as constituting, together, his last Will: and it was held by Shadwell, V.-C., that, although he was bound by the decision of the Ecclesiastical Court, to consider the two cheques as part of the Will, yet that nothing which that Court had done in the way of construction, would bind the Court of Chancery; and his Honour proceeded to state that his opinion, sitting in the Court of Construction, was that the bequests made by the cheques were revoked by the Will; and he decreed accordingly. This decision was afterwards affirmed by Lord Lyndhurst, C. (i), who considered the question as one of construction, which it was within the competence of the Court of Chancery to determine, notwithstanding the probate granted by the Ecclesiastical Court: And his Lordship relied on the case above stated, of *Gawler v. Standerrick*, and also that of *Campbell v. Lord Radnor* (k), in which it was declared that the first codicil, which had been admitted to probate, was to be considered as virtually revoked by the second (l).

Accordingly in *Thornton v. Curling* (m), Lord Eldon, C., expressed his opinion that if a British subject domiciled in a foreign country, by his Will appoints an executor, but makes a disposition of his personal property, which, though valid by the laws of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted in this country, to hold that the Will has no operation beyond appointing the executor: And his Lordship observed that although, as the Ecclesiastical Court had granted probate of the Will, he must take it to be a Will, yet what part of the contents of that Will was effectual, and in what way the

(i) 1 Phill. C. C. 294.

Ch. II. § VII.

(k) 1 Bro. C. C. 171.

(m) 8 Sim. 310.

(l) See *Post*, Pt. III. Bk. III.

Court should determine on the property, was quite a different thing (n).

So in *Campbell v. Beaufoy* (o), a plea by an executor who has proved a Will, that "the testator was at the date of his Will, and also at the time of his death, domiciled in France, and that all the bequests of the personal estate affected to be made by it are by the law of France null and void," was held by Wood, V.-C., to be a good plea in bar to a suit by a legatee under the Will for payment of his legacy and for administration of the personal estate of the testator.

So in *Loffus v. Maw* (p), which there has already been occasion to state, a revoking codicil, though it had been admitted to probate, was not allowed under the circumstances to have any revoking effect (q).

Cases where
probate, &c.,
is not conclu-
sive.

Under the law before the passing of the Court of Probate Act (1857), the jurisdiction of the Ecclesiastical Court was confined to goods and chattels; it had no power of administration over other property; and therefore its judgments would bind those only who claim an interest in personal property. Hence the probate was not conclusive evidence, or even, it should seem, admissible evidence, that the instrument was a Will, so as to pass copyhold or customary estate, or so as to operate as a sufficient execution of a power to charge land (r).

Again, it has already appeared (s), that to establish in evidence the Will of a married woman made in execution of a power, probate of it in the Court of Probate is first necessary, in order to confirm judicially its testamentary nature: But formerly the production of such a probate would not alone have been sufficient to induce a Court of Equity to act upon it; for there were other special circumstances which might have been required to give the instrument effect as a

(n) See *Concha v. Concha*, 11 App. Cas. 541. *Bradford v. Young*, 29 C. D. 617.

(o) *Johns*, 320.

(p) 3 Giff. 592.

(q) *Ante*, p. 109, n. (i).

(r) *Hume v. Rundell, Madd. & Geld*, 331.

(s) *Ante*, pp. 50, 328.

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valid appointment, viz., attestation, sealing, &c., with which circumstances the Temporal Courts did not trust the judgment of the Spiritual Court. The witnesses, therefore, to these facts, must have been examined in chief to prove that the Will was the wife's act, &c.; and if an attestation were not required by the power, still her signature must have been proved (t). But by the 10th section of the Wills Act all such additional varieties in the execution of testamentary appointments have, in effect, been abolished. Stat. 1 Viet. c. 26, s. 10.

Further, as the Court of Probate had no jurisdiction to authenticate a Will, as far as it relates to real estate, it was held that the probate was no evidence at all of the validity or contents of a Will, as to such property (u), not even when the original Will was lost (x), except indeed as a mere copy.

So on an indictment for forging a Will, probate of that Will unrepealed is not conclusive evidence of its validity so as to be a bar to the prosecution (y).

It must also be observed, that although the sentences of the Court of Probate are conclusive evidence of the right directly determined, yet they are not so of any collateral matter, which may possibly be collected or inferred from the sentence by argument (z). Therefore letters of administration which have been granted to a person as administrator of the effects of A. B. deceased, are not *prima facie* evidence of A. B.'s death (a).

(t) Rich v. Cockell, 9 Ves. 376.
See also Morgan v. Annis, 3 De G. & Sm. 461, where Knight Bruce, V.C., said he had no doubt the Court of Chancery had jurisdiction to decide on the validity of the execution of a testamentary power over personalty, with reference to the donee's state of mind at the time of the alleged execution.

(u) Bull, N. P. 245.

(z) Doe v. Calvert, 2 Campb.

389.

(y) Rex v. Buttery, Russ. & Ry. C. C. R. 342. Rex v. Gibson, *ibid.* 343, n. (a). It is said in Rex v. Vincent, 1 Stra. 481, that the probate was admitted as conclusive evidence on a similar prosecution: but that case must now be considered as overruled.

(z) Blackham's case, 1 Salk. 290.

(a) Thompson v. Donaldson, 3 Esp. N. P. C. 63. Moons v. De

Likewise, though no evidence was receivable to impeach the probate or the letters of administration, being the judicial acts of a Court having competent authority, yet it might be proved that the Court which granted them had no jurisdiction, and that therefore their proceedings were a nullity (*f*). So it may be proved that the supposed testator or intestate is alive: for in such case the Court of Probate can have no jurisdiction, nor their sentence any effect (*c*). And it may be shown that the seal attached to the supposed probate has been forged; for that does not impeach the judgment of the Court of Probate (*d*): or that the letters testamentary have been revoked; for this is in affirmance of its proceedings (*e*).

Alterations in the law as to the effect of probate as to real estate.

Stat. 20 & 21 Vict. c. 71. s. 61. Where a Will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

Very material alterations of some of the doctrines above stated were introduced by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

By sect. 61 of that statute, "Where proceedings are taken under this Act for proving a Will in solemn form, or for revoking a probate of a Will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a Will is disputed, unless in the several cases aforesaid the Will affects only personal estate, the heir at law, devisees and other persons having or pretending interest in the real estate affected by the Will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending interest in the

Bernales, 1 Russ. Chan. Cas. 301 (but see *French v. French*, Dick. 268, where Lord Hardwicke, under particular circumstances, admitted the probate as proof of the testator's death). However, if the plaintiff sues an executor or administrator, and there is no plea of *ne unques executor* or *administrator*, the plaintiff's right to sue

is admitted, and therefore no evidence can be required of the death of the testator or intestate: *Lloyd v. Finlayson*, 2 Esp. 564.

(*b*) *Allen v. Dundas*, 3 T. R. 130.

(*c*) *Ibid.*

(*d*) *Marriot v. Marriot*, 1 Stra. 671.

(*e*) *Bull. N. P.* 247.

"personal estate affected by a Will, should be cited or summoned and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court" (f).

And by sect. 62, "Where probate of such Will is granted, after such proof in solemn form, or where the validity of the Will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such Will, and the probate copy of such Will, or the letters of administration with such Will annexed, or a copy thereof, respectively, stamped with the seal of her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such Will, in like manner as a probate is received in evidence in

Sect. 62.
Where the Will is proved in solemn form, or its validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

(f) The affidavit on which an application to cite the persons interested in the real estate affected by a Will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England and at a date since the Wills Act came into operation: *Campbell v. Lucy*, L. R. 2 P. & D. 209. Where, in a suit commenced by caveat, the party propounding a Will wishes to cite the heir at law under this section, before pleas have been filed contesting the validity of the Will, he must make an affidavit that he intends to proceed and prove the Will in solemn form: *Peacock v. Lowe*, L. R., 1 P. & D. 311. In an action as to the validity of a

Will the Court refused to order the assignee of the heir at law of the testatrix to be cited as a person having or pretending interest in the real estate affected by the Will: *Jones v. Jones*, 7 P. D. 66. The provisions of the above section are not altered by the Judicature Acts and the rules therein contained, therefore in order that a decree in a testamentary suit may bind the heir at law or devisee of real estate, a citation should be taken out against them under the provisions of the above section, notwithstanding the directions of R. S. C. 1883, Ord. XVI, rule 11 [R. S. C. 1875, Ord. XVI, rule 13]. *Kennaway v. Kennaway*, 1 P. D. 148.

" matters relating to the personal estate ; and where probate
 " is refused or revoked on the ground of the invalidity of
 " the Will, or the invalidity of the Will is otherwise declared
 " by decree or order under this Act, such decree or order
 " shall enure for the benefit of the heir at law or other per-
 " sons against whose interest in real estate such Will might
 " operate, and such Will shall not be received in evidence in
 " any suit or proceedings in relation to real estate, save in
 " any proceeding by way of appeal from such decrees or
 " orders" (g).

Sect. 63.
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 tain cases not
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And by sect. 63, " Nothing herein contained shall make it
 " necessary to cite the heir at law or other persons having or
 " pretending interest in the real estate of a deceased person,
 " unless it is shown to the Court and the Court is satisfied
 " that the deceased was, at the time of his decease, seised of
 " or entitled to or had power to appoint by Will some real
 " estate beneficially, or in any case where the Will pro-
 " pounded, or of which the validity is in question, would not
 " in the opinion of the Court, though established as to per-
 " sonalty, affect real estate ; but in every such case, and in
 " any other case in which the Court may, with reference to
 " the circumstances of the property of the deceased or other-
 " wise, think fit, the Court may proceed without citing the
 " heir or other persons interested in the real estate: pro-
 " vided, that the probate, decree or order of the Court shall
 " not in any case affect the heir or any person in respect
 " of his interest in real estate, unless such heir or per-
 " son has been cited or made party to the proceedings, or
 " derives title under or through a person so cited or made
 " party" (h).

(g) This clause, as likewise the 61st section, *ante*, p. 478, and sections 63 and 64, *infra*, are not applicable to Wills executed before the Wills Act, or which in whole or in part have been executed not in accordance with the requirements of the Wills Act: *Campbell v.*

Lucy, 2 L. R., P. & D. 209.

(h) See *ante*, p. 284, and the Rule 78 (Contentious) there stated, as to obtaining the requisite order authorising the citation of the heir, &c. See also the cases cited, *ibid.*, note (f), as to the construction of the rule.

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And by sect. 64, "In any action at law or suit in equity,
"where, according to the existing law, it would be necessary
"to produce and prove an original Will in order to establish
"a devise or other testamentary disposition of or affecting
"real estate, it shall be lawful for the party intending to
"establish in proof such devise or other testamentary disposi-
"tion, to give to the opposite party, ten days, at least, before
"the trial or other proceeding in which the said proof shall
"be intended to be adduced, notice that he intends at the
"said trial or other proceeding to give in evidence, as proof
"of the devise or other testamentary disposition, the probate
"of the said Will or the letters of administration with the
"Will annexed, or a copy thereof, stamped with any seal of
"the Court of Probate; and in every such case such probate
"or letters of administration, or copy thereof respectively,
"stamped as aforesaid, shall be sufficient evidence of such
"Will and of its validity and contents, notwithstanding
"the same may not have been proved in solemn form, or
"have been otherwise declared valid in a contentious cause
"or matter, as herein provided, unless the party receiving
"such notice shall, within four days after such receipt, give
"notice that he disputes the validity of such devise or other
"testamentary disposition" (i).

It will be observed, that unless the Will has been proved
in solemn form and its validity declared by decree or order,
so as to fall within the 62nd section, it will still be neces-
sary to produce the original Will, if notice of disputing the

Sect. 64. Pro-
bate or office
copy to be
evidence of the
Will in suits
concerning real
estate, save
where the
validity of the
Will is put in
issue.

(i) The true meaning of this
provision appears to be that when
a notice has been given of the
intention to use the probate in
evidence, and the other side do not
give a counter notice within four
days, the probate, without more,
will be admissible evidence of a
Will and its contents as to realty,
and will be *prima facie* evidence
of the validity of the Will and

the competence of the testator: in
other words the probate alone will
be sufficient evidence to go to the
jury of a devise of realty, but there
is nothing to prevent the other
side from showing by evidence that
the Will is not valid, or that the
testator was not competent:
Barracough v. Greenhough, L. R.,
2 Q. B. 612 [reversing S. C., L. R.,
2 Q. B. 1].

validity be given under the 64th section. But such notice will be given at the peril of having to pay the costs of the production and proof of the Will (*k*).

Sect. 65. As to costs of proof of Will.

For by sect. 65, it is enacted, that "In every case in which, in any such action or suit, the original Will shall be produced and proved, it shall be lawful for the Court or Judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid."

How far the original Will may be referred to, in order to correct inaccuracies in the probate.

In *L'Fit v. L'Batt* (*l*), there was a French Will, the original whereof was proved in French, and, under it in the same probate, the Will was translated into English, but it appeared to be falsely translated; upon which it was objected, that the translation being part of the probate, and allowed in the Spiritual Court, it must bind: and the application must be to the Spiritual Court to correct the mistakes in the translation, which until then must be conclusive: but, by the Master of the Rolls (*m*), nothing but the original is part of the probate, neither hath the Spiritual Court power to make any translation: and supposing the original Will was in Latin (as was formerly very usual) and there should happen to be a plain mistake in the translation of the Latin into English, surely the Court might determine according to what the translation ought to be: And so it was done in that case.

In *Havergal v. Harrison* (*n*), where the words in the probate were "brother and sister," and it was suggested that in the original Will the words were "brothers and sister," Lord Langdale, M.R., said, he was bound by the probate, but if, on the production of the original Will, a doubt

(*k*) The absence of notice may, it would seem, be waived or the Court may adjourn the case to allow of the notice being given, or to allow proof of the Will *per testes*: *Hilliard v. Eiffe*, L. R., 7 H. L. 39-49.

(*l*) 1 P. Wms. 526. It seems

from *Re Cliffe's Trusts*, W. N. 1892, p. 66, that the Court of Construction will look at the foreign original even where an English translation only is proved.

(*m*) Sir Joseph Jekyll.

(*n*) 7 Beav. 49.

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existed as to the accuracy of the probate copy, the Court would give an opportunity to the parties to apply to the Ecclesiastical Court to set it right. Accordingly, in *Oppenheim v. Henry (o)*, *coram* Wood, V.-C., where the probate copy of a Will was in these words: "I release my sons from all claims due to me by bonds *on* moneys advanced to them by me," and his Honour was desired to look at the original Will, in order to ascertain whether the word written "*on*" in the probate was not "*or*" in the Will, the learned Judge declined to do so, and said that looking at the Will to ascertain the alleged inaccuracy of the probate was quite different from the case of a question arising on the punctuation of the Will, or on the introduction of a capital letter, or other mark indicating where a sentence was intended to begin, and which might affect its sense.—The law seems not to be settled on the point last suggested by his Honour, *viz.*, whether, and in what cases, the Court will look at the Will itself in order to derive aid in its construction from the punctuation, or manner of writing, or from other appearances on the face of it. In *Compton v. Bloxham (p)*, *coram* Knight Bruce, V.-C., his Honour relied, in construing a Will, on the circumstance that certain words began an entirely new sentence; and he begged to have it observed, that although it was a Will of personalty, he had sent for and examined the original Will, and had been influenced by it in his construction. Again, in *Shea v. Boschetti (q)*, where a *fac-simile* probate of a Will, with certain passages of it struck through, had been granted, Sir J. Romilly, M.R., expressed his opinion that, whether the Court of Probate grants a *fac-simile* probate or not, the Court of Chancery is bound to look at anything in the original Will itself which may aid and assist it in coming to a correct conclusion as to the construction to be put upon the contents of the Will. So in *Manning v. Purcell (r)*, it appears that the Lords Justices

(o) 9 Hare, 802, note (b) to (q) 18 Beav. 321.
Walker v. Tippin. (r) 7 De G. M. & G. 55.
(p) 2 Coll. 201.

in construing a Will of personalty, ordered the original Will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate, notwithstanding that counsel objected that the probate copy could alone be looked at. And in the case of *Re Harrison* (s), where a testatrix in making her Will used a law stationer's form, which was partly in print, blanks being left in it, which were to be filled up by the person who made use of it, and after directing that her debts and funeral and testamentary expenses should be paid by her executrix thereafter named gave all her property both real and personal "unto to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece Catherine Hellard to be executrix of this my last Will and testament." The Court of Appeal held that there was an effectual gift of the residue to Catherine Hellard, and that for the purpose of construing a Will the Court is entitled to look at the original Will, as well as at the probate copy. In his judgment, Lord Esher, M.R., says, "The main argument in this case is founded on there being a blank in the Will, and how can you tell that there is a blank without looking at the Will? I know of no rule that for the purpose of construing a Will you may not look at the original Will itself." In this judgment Baggallay, L.J., concurred, who said, "I fully agree that, for many purposes, the first thing to be looked at is the probate copy of the Will. But when I look at the probate copy in this case, I find that there is a blank space in it. This is consistent either with an accidental omission to fill up the blank or with an intention not to fill it up. Then it becomes material to look at the original Will." But in *Gann v. Gregory* (t), *coram* Lord Cranworth, C., where the Ecclesiastical Court had granted a *fac-simile* probate of a Will, made after the Wills Act came into operation, with cross lines drawn in ink over the bequests of certain legacies (the decree in the Prerogative Court

(s) 30 C. D. 390.

(t) 3 De G. M. & G. 777.

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having been pronounced for the Will as contained in the document, "with the several alterations, interlineations, and erasures, appearing therein"); and it was suggested to his Lordship, that if the original Will were looked at, it would be seen that the pencil alterations made in the legacies contained under the cross lines must have been made after those lines were drawn, and it might thence be inferred that the testator meant the legacies to remain part of the Will; his Lordship said that he was not of those who thought it was competent for the Court of Chancery on every occasion to look at the original Will, though he was aware Lord Eldon did it in some instances, but in each there were particular circumstances: And his Lordship proceeded to express his opinion, that as probate had been granted of the Will, with the alterations in it, it must be taken as conclusively settled by the Ecclesiastical Court that the Will was at its execution in its present state; that is, that the testator executed the instrument with the lines drawn over it, meaning thereby, that the legacies were not to stand part of the Will. Again, in *Taylor v. Richardson (u)*, *coram* Kindersley, V.-C., where the probate had been delivered out with blanks in the course of the Will, and it was suggested that it might be construed as if the words ran continuously, his Honour observed, that the Ecclesiastical Court said that the Will was an instrument in such and such words, and in certain places, such and such blanks, and that the Court of Chancery was bound to look at them as part of the Will.

In the earlier editions of this work Sir Edward Vaughan Williams wrote as follows:—"On the whole, it may, perhaps, be doubted whether, in strictness, the Court of Chancery has not gone beyond its legitimate means for construing Wills of personalty even in the instances above mentioned, where it has sought aid from appearances in the Will itself not to be found in the probate, and whether the more proper course is not to apply to the Probate Court for a corrected

“*fac-simile* probate, if it be desired to rely on stops or capital letters, or any marks which, in truth, are apparent in the Will, though not in the probate. For until the Court of Probate has sanctioned them as legal parts of the Will, *non constat*, that they have not been introduced by a stranger, or by the testator himself after the Will was executed, or otherwise, so as not properly to form a part of it: And this can only be decided in the Ecclesiastical Court, which is bound to exclude from its probate, whether a *fac-simile* probate or not, all such appearances on the face of the Will as do not legitimately belong to it as a testamentary instrument.” But the present practice would seem to be to look at the original Will (x).

(x) See *Re Harrison*, 30 C. D. 389.

CHAPTER THE SECOND.

OF THE REVOCATION OF PROBATE AND LETTERS OF
ADMINISTRATION.

BY the Court of Probate Act, 21 & 22 Vict. c. 77, s. 75, Court of Probate Act, s. 75. After grant of administration no one to have power to sue, &c., as executor until the grant is recalled or revoked.

"After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act (a) as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

A probate or a grant of letters of administration may be revoked in two ways: 1. On a suit by citation. 2. On an appeal to a higher tribunal to reverse the sentence by which they are granted.

A revocation by citation usually is, when the executor or administrator is cited before the Judge by whom the probate or letters of administration were originally granted, to bring in the same, and to show cause why they should not be revoked (b).

(a) When administration has been granted, and another person intermeddles with the goods, this shall not make him executor *de son tort*, by construction of law. *Ante*, pp. 211, 212.

(b) It was said in the judgment both of Sir James Hannen and Cotton, L.J., in the case of *Priestman v. Thomas*, 9 P. D. 70, 210, that the Chancery Division has no jurisdiction to revoke a Will, but that the exclusive jurisdiction so to do is vested in the Probate Division. Although, it is submitted, this proposition is too wide, inasmuch as all Divisions

have now equal and concurrent jurisdiction in matters testamentary, still the question does not appear to be of great practical importance, inasmuch as in the event of a person commencing proceedings for revocation in any Division but the Probate Division, such proceedings would, upon application to the Judge, be transferred into the Probate Division, as the Division which can more conveniently and appropriately deal with such matters. See *Pinney v. Hunt*, 6 C. D. 98, and *Bradford v. Young*, 26 C. D. 656.

Revocation on appeal :

An appeal under the old law was to be effected by demanding letters missive, called *Apostoli*, from the Judge *a quo*, to the Judge *ad quem* (c).

Manner and form of appeals, stat. 24 H. 8.

The manner and form of appeals were regulated by several statutes. By stat. 24 H. VIII. c. 12, s. 5 (repealed by 1 & 2 Ph. & M. c. 8, and revived by stat. 1 Eliz. c. 1), the appeal, where the cause was commenced before the Archdeacon, lay to the Bishop; and by sect. 6, where the cause was commenced before the Bishop, to the Archbishop of the province;—and by sect. 7, where the cause was commenced before the Archdeacon of the Archbishop to the Court of Arches (d), and from the Court of Arches to the Archbishop.

Stat. 25 H. 8, c. 19. Appeal to the delegates.

By statute 25 Hen. VIII. c. 19, an appeal was given from the Archbishop to certain commissioners.

These commissioners were commonly called Delegates (according to the language of the civil and canon law), on account of the special commission or delegation they received from the King (e).

(c) Gibs. Cod. 1035.

(d) Com. Dig. tit. Prerogative (D. 13), citing *Heath v. Atworth*, 2 Dyer, 240, b. The person who administers justice in the Court of Arches, is the Official Principal of the Archbishop: who was called *officialis de arcubus*, and the Court itself *curia de arcubus*, from its being anciently held in the *Ecclesia B. Mariæ de Arcubus*, or Bowchurch, by reason of the Archbishop's having Ordinary jurisdiction in that place, as the chief of his Peculiars in London, and being the church where the Dean of those Peculiars (commonly called the Dean of the Arches) held his Court. And because these two Courts were held in the same place, and the Dean of the Arches was usually substituted in the absence of the Official while the

offices remained in two persons, and the offices themselves have in many instances been united in one and the same person, as they now remain; by these means a wrong notion hath obtained, that it is the Dean of the Arches, as such, who hath jurisdiction throughout the province of Canterbury: whereas the jurisdiction of that office is limited to the thirteen Peculiars of the Archbishop in the city of London; and the jurisdiction throughout the province, for receiving of appeals, from the sentences of inferior Ecclesiastical Courts and the like, belonged to him only as Official Principal: Gibs. Cod. 1004.

(e) The king might appoint whom he pleased as Delegates: Com. Dig. Prerogative (D. 14). And in the exercise of its discre-

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No appeal lay from a sentence in a Court of Delegates; Commission of review.
not even to the Lords in Parliament (*f*). But on a petition to the King in council, a Commission of Review might be granted under the great seal, appointing new Judges, or adding more to the former Judges, to revise, review, and rehear the cause (*g*): for the King was not restrained by the statutes 24 & 25 Hen. VIII., and the Pope, as Supreme head, whose authority is now annexed to the Crown by

tion the Court of Chancery would either grant a full commission of Delegates, *i.e.* to Lords Spiritual and Temporal, Judges of the Common Law and civilians, or one to judges and civilians only. When the jurisdiction of bishops was in controversy, or a question depending that concerned the Canon and Ecclesiastical law, a full commission was granted: Where it was altogether a matter of law, as a question on a Will, a commission issued to judges and civilians only: *Ex parte Hellier*, 3 Atk. 798. If any of the judges were in the commission, the place of assembly was usually appointed by one of them at Serjeants' Inn: Com. Dig. Prerogative (D. 14). If the Delegates were equally divided in opinion, a commission of adjuncts might issue to add others to the Judges Delegates: *Emerton v. Emerton*, T. Raym. 475. 4 Burr. 2254. The proceedings of the Delegates were according to the rules of the civil and Ecclesiastical law: *Vanbrough v. Cock*, 1 Chan. Cas. 201, by the Lord Keeper. And on that account it had been particularly adjudged, that a suit there did not abate by the death of the parties; this being the course of the Ecclesiastical Courts: 1 Burn. Ecc. L.

61, 62. Com. Dig. Prerogative (D. 14). The Delegates could not fine or imprison: 4 Inst. 334: and whether they had power to excommunicate has been doubted: *Stevenson v. Wood*, 2 Bulst. 4; though it seems to have been exercised in practice: 2 Roll. Abr. 223, Prerogative (G.), pl. 3. Wood's Inst. 505. The Court of Delegates, it should seem, had no original jurisdiction, but was only to review, and to reverse or affirm, the sentence appealed from. Therefore, the better opinion appears to be, that they could not grant letters of administration or probate: *Stevenson v. Wood*, 2 Bulst. 4. *Reeve v. Denny*, Latch. 85. *Contra*, 2 Roll. Abr. 223, Prerogative (G.), pl. 4: and see Com. Dig. Administrator (B. 2). It is said in Toller, p. 75, that where probate granted by the special court is affirmed on an appeal to the Arches or Delegates, the usage is to send the cause back: But when the first sentence is reversed, the Court below shall be ousted of its jurisdiction, and the Court which reverses it shall grant probate *de novo*.

(*f*) *Saul v. Wilson*, 2 Vern. 118.

(*g*) 1 Oughton, tit. 302, sect. 2 note (*e*), pl. 5.

stat. 26 Hen. VIII. c. 1, and 1 Eliz. c. 1, had power to do it (*h*).

Stat. 3 & 4
W. 4, c. 92.
Appeal to
Judicial
Committee.

But by stat. 3 & 4 Will. IV. c. 92, the statute of 25 Hen. VIII. was repealed, and the power of the Court of Delegates transferred to the Judicial Committee of the Privy Council.

Court of Pro-
bate Act, s. 39.
Appeal from
the Court of
Probate to the
House of
Lords.

And by the 39th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the appellate jurisdiction in matters and causes testamentary was transferred from the Privy Council to the House of Lords.

By Judicature
Acts appeal
from Probate
Division to
Court of
Appeal.

But now that by the Judicature Acts the jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court of Justice [see *ante*, p. 239], the appeal from that Division is to the Court of Appeal as constituted by those Acts (*i*).

The time within which an appeal must be brought is twenty-one days from an interlocutory order, and a year from a final judgment, unless the time be enlarged by the Court of Appeal (*k*).

The notice of appeal must, in the case of a judgment final or interlocutory, be a fourteen days' notice, and in the case of an interlocutory order, a four days' notice (*l*).

Second grant
of administra-
tion or pro-
bate without
revoking the
first.

Some authorities maintain that if the Ordinary committed administration to the wrong party, and then committed it to the right, the second grant was a repeal of the first, without any sentence of revocation (*m*); but in other cases, it has been held, that the first is not avoided except by judicial

(*h*) 4 Inst. 341. *Gervis v. Hal-
lewell*, Cro. Eliz. 571.

(*i*) See Judicature Act, 1873, s. 19. When a cause in the Probate Division has been heard before a judge without a jury, the evidence being given *vivâ voce*, the parties may, if they please, apply for a re-hearing under rule 60 of the Probate Orders, July, 1862, or they may appeal from the de-

cision of the judge, on the facts as well as the law, to the Court of Appeal. *Sugden v. Lord St. Leonards*, 1 P. D. 154.

(*k*) See R. S. C. 1883, Ord. 58, r. 15.

(*l*) See R. S. C. 1883, Ord. 58, r. 3.

(*m*) *Newman v. Beaumont, Owen*, 50. 4 Burn. E. L. 293. *Godolph. Pt. 2, c. 31, s. 4.*

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c. 31, s. 4.

sentence (n). And the practice was, to call in and revoke the first administration before the second was granted (o). So, before revocation of a probate, the Court will not grant a new one (p).

It remains to consider what are sufficient grounds for the revocation of a probate or letters of administration.

It has already appeared, that where an executor obtains probate of a Will in common form, he may be afterwards cited by a next of kin, to prove it *per testes*, or in solemn form (q). And upon this citation, if the executor does not sufficiently prove the Will, the probate will be revoked.

If the Will has been proved in solemn form, either by the executor himself in the first instance, or upon citation as above stated, and the next of kin have been cited to see proceedings, they cannot afterwards, by a fresh citation, again put the executor on proof of the Will (r). But if fraud can be shown, or if a later distinct Will be set up, then the parties having an interest under such later Will may again cite the executor, who has succeeded in proving in solemn form, and obtain a revocation of the probate (s).

It was held in *Nicol v. Askew* (t), that probate of a testamentary paper, in the nature of a codicil, having been granted by consent in common form, could not afterwards be revoked on the allegation that the conditions on which such consent was given had not been complied with, there being no proof of fraud or circumvention practised either upon the Court or the parties.

(n) *Pratt v. Stocke*, Cro. Eliz. 315. Toller, 126.

(o) Toller, 126. But see In the goods of Langley, 2 Robert, 407, where an administration granted to a woman, falsely swearing herself to be the wife of the deceased, was, after the necessary decrees had been taken out, and attempts made to serve her, but without success, declared to be null and void and administration decreed

to the lawful widow, notwithstanding the prior administration was outstanding.

(p) Toller, 75. *Rains v. Commissary of Canterbury*, 7 Mod. 146, 147.

(q) *Ante*, p. 275.

(r) *Ante*, pp. 275, *et seq.*

(s) Wentw. Off. Ex. 111, 112, 14th edition.

(t) 2 Moore, P. C. C. 88.

What are sufficient grounds for the revocation or reversal: of probates:

of letters of
administra-
tion :

With respect to the question as to what shall be a just ground for the revocation of letters of administration : it has been said, that at common law the Ordinary might repeal an administration at his pleasure (*u*) : but now since the statute 21 Hen. VIII. c. 5, when it is granted, it cannot be repealed, unless for a just cause (*v*). So where administration is granted without the obligation of the statute, as administration *durante minore etate*, it was held that when the Ordinary had once exercised his power by granting the administration, he should not repeal it without due cause (*w*). Again, though the Court has power to revoke a limited administration, it is very unwilling to do so, unless there was some misrepresentation in the first instance in obtaining the grant (*x*).

when granted
to next of kin :

It was at one time doubted whether the Ordinary could revoke or repeal administration on any ground, but it is now agreed that the administration, though granted to a next of kin, may be repealed by the Court, not arbitrarily, yet where there shall be just cause for so doing ; of which the Temporal Courts are to judge (*y*).

Therefore the administration may be revoked where it was granted in an irregular manner, as where a next of kin comes too hastily to take out the administration within the fourteen days (*z*) : or where it has been granted *non vocatis jure vocandis*, without citing the necessary parties (*a*) : in which cases, the administration, though not void, is voidable.

next of kin
non compos :
or beyond sea :

Again, the administration may be revoked, if a next of kin, to whom it has been committed, becomes *non compos*,

(*u*) Brown v. Wood, Aleyn, 36. Godolph. Pt. 2, c. 31, s. 4.

(*v*) Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 5.

(*w*) Grandison v. Dover, Skinn. 155.

(*x*) Lopes v. Hartley, 7 Notes of Cas. Supplement, p. xxxi.

(*y*) Burn, E. L. 293. 3 Bac. Abr. 50 tit. Executors (E. 3) 12.

See Koster v. Sapte, 1 Curt. 691.

(*z*) 3 Bac. Abr. *ubi supra*.

(*a*) Com. Dig. Administrator (B. 8). Ravenscroft v. Ravenscroft, 1 Lev. 305.

or otherwise incapable (b), or, it has been said, if he goes beyond sea (c).

A fortiori, the Court may repeal its grant of administration, when made to other than the next of kin, as if it be granted to a next of kin, together with one not of kin, as to a sister and her husband (d): or to one of kin, but not next of kin (e): or to a creditor before the renunciation of the next of kin (f). In these cases, the administration is not void, but voidable only (g).

when granted
to one not
next of kin :

In the case of *In the goods of Ferrier* (h), the tenant for life of certain property having assigned over his interest to the remainderman, an administration with the Will annexed, which had been granted to the tenant for life, limited to that interest, was revoked, and a new administration, limited to that property, decreed to the remainderman, then possessed of the sole interest therein.

when granted
cum testamento
annexo :

In another case a creditor, having obtained an administration *cum testamento annexo*, and completely settled his own debt, went away: Sir John Nicholl said, he saw no other remedy, than that the administration should be revoked, and the executor should retract his renunciation, and be allowed to take probate of the Will; otherwise great loss might accrue, and injustice be done; and the learned judge observed, that the Court has greater authority over an administrator with the Will annexed, granted to a creditor, than over an administration under the statute (i).

(b) Agreed by all the justices in *Offley v. Best*, 1 Sid. 373. Bac. Abr. *ubi supra*. 4 Burn. E. L. 292. Com. Dig. Administrator (B. 8). See ante, pp. 441, 442.

(c) Bac. Abr. *ubi supra*.

(d) *Brown v. Wood*, Aleyn. 36. Com. Dig. Administrator (B. 8). Ante, p. 441.

(e) *Blackborough v. Davis*, 1 Salk. 38. Anon. Hetley, 48.

(f) *Ibid.* Com. Dig. Adminis-

trator (B. 6).

(g) *Ibid.*

(h) 1 Hagg. 241. See *In the goods of Reid*, 11 P. D. 70.

(i) In the goods of Jenkins, 3 Phillim. 33. And where a grant of administration of the estate of an intestate was made to a creditor who, after his debt had been fully satisfied, absconded, and could not be found, the Court revoked the grant to the creditor, without

Administration *cum testamento annexo*, whether granted to a next of kin, or one not next of kin, is voidable, and may be repealed, if there be a residuary legatee (*k*).

Although it has always been the law that upon an executor's renunciation, whereupon administration was committed to another, the executor could not go back again and assume the executorship, yet questions used to arise as to the revocation of administration granted in the case of an executor who would not renounce, or take any step. Such cases, however, cannot now arise since the passing of statutes 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16, except perhaps in a case where the Court grants administration without knowing that the executor has acted and the Court thinks fit to compel such executor to act (*l*).

In the case of *Trimlestoun v. Trimlestoun* (*m*), an administration with a Will annexed, obtained after a caveat entered had expired, but without notice to the adverse party, and while the Will was in suit in Ireland—the *forum domicilii*—was revoked, as surreptitiously obtained, and the party condemned in costs of a petition in support of it.

If administration be repealed *quia improvide*, that is, where on a false suggestion in respect to the time of the intestate's death, it issued before the expiration of a fortnight from that event, or where the Court in committing it took security inadequate to the value of the property, it shall be granted to the same person (*n*).

The following grounds for revocation have also been held to be sufficient (*nn*).

citing him, and made a new grant to the sole next of kin of the deceased. In the goods of Bradshaw, 13 P. D. 18. These cases have been followed in the late case of In the goods of Covell, 15 P. D. 8.

(*k*) Godolph. Pt. 2, c. 31, s. 3. *Ante*, p. 400.

(*l*) See *ante*, pp. 226, 227.

(*m*) 3 Hagg. 243.

(*n*) Toller, 125. Com. Dig. Administrator (B. 8). Offley v. Best, 1 Sid. 293.

(*nn*) See Tristram & Coote's Probate Practice, 10th ed., pp. 198–204, where the following instances will be found set forth.

re-grant *ad eundem* after a revocation *quia improvide*, &c.

Where a woman claiming to be the widow of the intestate, but who had not been legally married, obtained administration to the deceased as her husband the grant was revoked (o): and so in a case where persons who claimed to be next of kin to the intestate but who were in reality only illegitimate relatives had obtained administration (oo). The fact that the person of whose estate administration has been granted is still living is a sufficient ground for revocation.

Other grounds for revocation.

Where the Court of Chancery after grant made has differed from the Prerogative Court in its construction of the Will (p). As in a case where the Prerogative Court had granted letters of administration to the next of kin *cum testamento annexo*, and refused it to the residuary legatee, on the ground that the residuary bequest was void, and the Court of Chancery subsequently held that the bequest was good, and that the residuary legatee took a beneficial interest under it.

Where administration has been granted to the elected guardian of the intestate's children, there being a testamentary guardian who had not renounced (q).

Where one of two or more administrators becomes incapable and of unsound mind (r), or it has been said if he goes beyond sea.

A creditor having been paid his debt was desirous *bonâ fide* of retiring from the administration of the estate (s).

If administration (with a Will only annexed) has been granted and a codicil afterwards found a separate grant cannot be made of the latter, as in the case of a probate, but the administration with the Will annexed must be revoked and a

(o) In the goods of Moore, 3 Not. of Cas. 601. (q) In the goods of Morris, 2 Sw. & Tr. 360.
(oo) In the goods of Bergman, 2 Not. of Cas. 22. (r) In the goods of Newton, 3 Curt. 428.
(p) Warren v. Kelson, 28 L. J., P. & M. 122. 1 Sw. & Tr. 290. (s) In the goods of Hoare, 2 Sw. & Tr. 361, n.

new administration taken with both the Will and codicil annexed (*t*).

The Court requires the revoked grant to be produced and delivered to the Registrar at the time of its revocation, so that it may be cancelled. If, however, owing to the grantee having left the country, it is impossible to compel the production of the grant, the Court will revoke it though it cannot cancel it (*u*).

Caveat.

It is usual, where there is a question about a Will, or when the right of administration comes in dispute, to enter what is called a *caveat* (which is a caution entered in the Court of Probate to stop probates, administrations, faculties, and such like from being granted without the knowledge of the party that enters) (*x*). A *caveat* remains in force for six months, and may be renewed (*a*).

What is not
a ground for
revocation.

If administration be granted to a younger brother, the elder cannot have it repealed, unless it has been granted by surprise (*b*). So if administration be granted to a creditor, and afterwards a creditor to a larger amount appear, it shall not be revoked for him (*c*). So also administration *de bonis non*, with the Will annexed, granted to one where two had equal right, is good and shall not be revoked (*d*). Nor can the Court revoke the grant on account of abuse; for it ought to take sufficient caution in the first instance to prevent maladministration (*e*). Nor can the Court revoke it

(*t*) Tristram & Coote's Probate Practice, 10th ed., p. 202.

(*u*) Baker v. Russell, 1 Cas. temp. Lee, 167.

(*x*) 3 Burn, E. L. 244, Phillimore's edition.

(*a*) See P. R. 1862, Non-contentious, Rule 60. The practice as to caveats is now regulated by the stat. 20 & 21 Vict. c. 77, s. 53, and the rules of 1862, P. R. Nos. 59, 60, 61, 62, 63, 64, 65, 66, 67. It is not thought requisite to do more than refer to this

enactment and these rules, as the subject is not, it is considered, properly within the scope of this Treatise.

(*b*) Ayliff v. Ayliff, 2 Keb. 812. So where a niece obtained administration, a nephew could not get it repealed: Hill v. Bird, Sty. 102. *Ante*, p. 364.

(*c*) Dubois v. Trant, 12 Mod. 438. (*d*) Taylor v. Shore, T. Jones, 161.

(*e*) Thomas v. Butler, 1 Vent. 219, by Hale.

Will and codicil

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v. Butler, 1 Vent.

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on account of the administrator's omission to bring an inventory and account (f).

And if an administration has been properly granted, it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the effects; at all events, unless some strong ground for the revocation be shown. Therefore, where a party entitled in distribution to an intestate's effects, took out administration under a belief that she and her brother were the only next of kin, but, finding there were other parties equally entitled, and that the estate must be administered by the Court of Chancery, and not having intermeddled with the effects, she applied for a revocation of her grant and a new one to one of the other parties who was willing to take it, the rest consenting; the Court refused the application, on the ground that an administration, properly granted, could not be revoked on a mere suggestion that it would be for the benefit of the estate (g). Administration with the Will annexed was granted to a woman who intermeddled with the estate, and subsequently married. Her husband deserted her, and could not be found. Upon an application for a revocation of the grant, and a fresh grant to another person, it was held by the Court of Appeal that where there has been a general grant of administration, and the administratrix has intermeddled with the general estate, the grant cannot be revoked (h).

As to revoking a grant limited to a particular property on the application of the administrator, see *In the goods of Ferrier, ante*, p. 493.

The Court cannot revoke at the application of a creditor, whatever may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right (i).

Nor will the Court revoke a grant limited to attending pro-

(f) Hill v. Bird, Sty. 102.

P. D. 70.

(g) In the goods of Heslop, 1 Robert. 457.

(i) In the goods of Bergman, 2 Notes of Cases, 23.

(h) In the goods of Reid, 11

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ceedings in the Court of Chancery before the suit is ended in order to enable the next of kin to take a general grant (*k*).

How far a party who has once propounded a Will and withdrawn is barred.

In the case of *Trower v. Cox* (*l*), the attorneys of an executrix had withdrawn from the suit, after propounding an alleged Will, and suffered a next of kin to take administration; and it was held, *under the particular circumstances* of the transaction, that the executrix was not barred from calling upon the next of kin to bring in the administration, and re-propounding the alleged Will. But in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the Court, as far as it legally can, will hold them bound (*m*).

An executor who has proved a Will in common form cannot, as such executor, take process to call in question the validity of that Will. He has no right, therefore, to cite the persons interested under it, to propound it in solemn form, or show cause why the probate in common form should not be revoked. The executor of an executor is in the same position in this respect as the original executor (*n*).

Citation by next of kin, contesting a Will, of all persons interested "to see proceedings."

Where a next of kin is cited by an executor to see a Will propounded, and contends for an intestacy, he may take out a decree, citing all persons interested under the Will, "to see proceedings;" for although it is true, that the act of the executor, being the appointee of the deceased, would, to a certain extent, bind all persons interested under the Will (*o*), yet some party might, perhaps, at a future time, allege collusion (*p*). The decree in such a case should be framed in the largest terms "against all persons in general," and if any of the legatees happen to be dead, care should be taken to cite their representatives (*q*).

(*k*) In the goods of Brown, L. R., 2 P. & D. 455.

(*l*) 1 Add. 19.

(*m*) 1 Add. 225.

(*n*) In the goods of Chamberlain, L. R., 1 P. & D. 316.

(*o*) See *Wood v. Medley*, 1 Hagg. 657, 658, 667, 668.

(*p*) *Colvin v. Fraser*, 1 Hagg. 107. *Ante*, p. 280.

(*q*) *Ib.*, 107, 109. See *ante*, p. 278.

suit is ended in
ral grant (*k*).

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od v. Medley, 1
8, 667, 668.
v. Fraser, 1 Hagg.
280.
109. See *ante*, p.

The parties thus cited need not appear at all; and in ordinary cases, if they intervene, when an executor, the person entrusted by the executor to see his Will executed, is before the Court, they will not be allowed their costs out of the estate (*r*).

Where two parties appear *before* any administration has been granted, both are to propound their interests, and proceed *pari passu* (*s*). But where an administration has been regularly obtained, the person in possession of it is not bound to propound his interest, till the party calling it in question has established his own (*t*).

Party in possession of administration not bound to propound his interest till the party calling it in question has established his own.

When probate has been granted of the Will of an officer in the army, on the affidavit of his brother and executor, that he had received intelligence that the testator had been killed in battle, which he believed to be true, but which was in fact unfounded, the proctor for the executor brought and left in the registry the probate, and the Court, on motion of counsel, by an interlocutory decree, revoked the same, and declared it to be null and void to all intents and purposes: At the same time the supposed deceased appeared personally, and the judge, at his petition, decreed the original Will, together with the probate first cancelled, to be delivered out of the registry to him (*u*).

Revocation of probate of Will of one falsely supposed to be dead.

(*r*) Colvin v. Fraser, 2 Hagg. 368. lim. 155. Hibben v. Calemberg, 1 Phillim. 166.

(*s*) *Ante*, p. 361.

(*t*) Dabbs v. Chisman, 1 Phil-

(*u*) In the goods of Napier, 1 Phillim. 83.

CHAPTER THE THIRD.

OF THE EFFECT OF REVOCATION OF PROBATE, OR LETTERS OF ADMINISTRATION, ON THE MESNE ACTS OF THE EXECUTOR OR ADMINISTRATOR.

IT remains to consider what effect the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator.

Before dealing with the principles governing the effect of revocation, and the cases decided thereon, it seems desirable to call attention to the statutory enactments which have, to a large extent, rendered inapplicable the old principles and cases.

Stat. 20 & 21
Vict. c. 77,
s. 77.
Payments
under revoked
probates or
administration
to be valid.

By sect. 77 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is expressly enacted that "where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same, and the executor or administrator, who shall have acted under any such revoked probate or administration, may retain, and re-imburse himself in respect of, any payments made by him, which the person, to whom probate or administration shall be afterwards granted, might have lawfully made."

Sect. 78.
Persons
making pay-
ments upon
probates or
administration
to be in-
dennified.

And by sect. 78 it is enacted that "all persons and corporations, making, or permitting to be made, any payment or transfer *bonâ fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

The first important distinction on this subject is, between grants which are void, and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator, done between the grant and its revocation, except in so far as they are protected by the above-mentioned statutes, shall be of no validity: As if administration be granted on the concealment of a Will, appointing executors, and afterwards a Will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; nor can they, although the executor should refuse to act, be made good by relation (a): So in *Graysbrook v. Fox* (b), an action of *detinue* was brought by an executor against the defendant who had purchased goods belonging to the testator, from one to whom the Ordinary had, immediately after the testator's death, and before the executor had proved the Will, granted administration; and it was holden that the executor who sued after probate might recover. So, if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the executor aforesaid appear and renounce (c). So in the case of *Poolley v. Clark* (d), a Will was proved by the executor named in it, who after probate sold the

Where the
grant is void:

(a) *Abram v. Cunningham*, 2 Lev. 132. But a grant of letters of administration obtained by suppressing a Will containing no appointment of executors is not void *ab initio*, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under these circumstances to a purchaser who was ignorant of the suppression of the Will was upheld by the Court although the grant was revoked after the sale: *Boxall v. Boxall*, 27 C. D. 220. It is to be observed that Kay, J., in this case con-

sidered that *Abram v. Cunningham*, *ubi sup.*, was decided on the ground that the concealed Will had appointed executors, who, therefore, had a right of property vested in them before probate, and not upon the fraud committed in concealing the Will.

(b) *Plowd.* 276.

(c) *Abram v. Cunningham*, *ubi supra*.

(d) 5 B. & A. 744. But this case would seem to be of doubtful authority. See *ante*, p. 222, note (a), and p. 224.

goods of the testator ; at the time of the sale he had notice of a subsequent Will, which was afterwards proved, and the probate of the former Will revoked on citation : whereupon the executor under the latter Will brought trover against the executor under the former for the goods sold : and it was holden, that the action was sustainable to recover the full value, and that the defendant was not entitled, in mitigation of damages, to show that he had administered assets to the amount.

In these cases, when the wrongful executor or administrator has sold the property of the deceased, the rightful representative may either, as in the case just mentioned, maintain trover, or detinue ; or he may bring assumpsit for the money produced by the sale, as so much money received to his use, as executor or administrator ; for the plaintiff may waive the tort, and suppose the sale made with his consent (*e*).

It should seem, however, that, as between the rightful representative and a person to whom the executor or administrator under a void probate, or grant of letters, has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void. Thus in the case of *Graysbrook v. Fox*, above mentioned, it was laid down by the Court, that if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible for ever (*f*).

If the grant were only voidable, then another distinction

Where the grant is voidable.

(*e*) *Lamine v. Dorrell*, 2 Lord Raym. 1216. Where an auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment, the real executrix claimed the money from the buyer, it was held that the auctioneer could not afterwards maintain an action against the buyer, though the latter expressly promised to

pay on being allowed to take away the goods : *Dickenson v. Naul*, 4 B. & Adol. 638. See also *Croskey v. Mills*, 1 Crompt. M. & R. 298. *Allen v. Hopkins*, 13 M. & W. 94.

(*f*) *Plowd.* 282, 283. See *ant.*, pp. 222, 223. *Coulter's case*, 5 Co. 30, *b*. *Parker v. Kett*, 1 Lord Raym. 661.

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allowed to take away Dickenson v. Naul, 4 38. See also Cross- 1 Crompt. M. & R. Hopkins, 13 M. &

262, 263. See ante, Coulter's case, 5 Co. r. Kett, 1 Lord Raym.

arises between the case of a suit by citation, which is to countermand or revoke a former probate or former letters of administration, and an appeal, which is always to reverse a former sentence (*g*). In case of an appeal all intermediate acts of the executor or administrator are ineffectual; because the appeal suspends the former sentence (*h*); and on its reversal it is as if it had never existed (*i*).

But if the suit be by citation, and the grant of administration be voidable only (as where it has been granted to a party not next of kin) (*k*), or on the refusal of an executor who has before administered (*l*), or *non vocatis jure vocandis*, without citing the necessary parties (*m*), all lawful acts done by the first administrator shall be valid: as a *bonâ fide* sale or a gift by him of the goods of the intestate (*n*), and such gift shall be available, even if it were with intent to defeat the second administrator, or were made *pendente lite*, on the citation (*o*); although by stat. 13 Eliz. c. 5, it be void as to a creditor (*p*). Again, if the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good: so that the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional administrator (*q*). So if administration be committed to a creditor, and after repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and his disposal of goods, even pending his citation, till sentence of repeal, is good (*r*). And where there was a citation to repeal administration, but the grant was affirmed and administration granted to

(*g*) Packman's case, 6 Co. 18, *b*, ante, p. 487.

(*h*) Price v. Parker, 1 Lev. 158.

(*i*) 6 Co. 18, *b*. Many such intermediate acts are now protected by the sections of 20 & 21 Vict. c. 77, above cited.

(*k*) Ante, p. 493.

(*l*) Ante, p. 227.

(*m*) Ante, p. 492.

(*n*) Wadsworth v. Andrews,

cited Dyer, 166, *b*, in marg.

(*o*) Bro. Abr. Administrator, pl. 33. Packman's case, 6 Co. 18, *b*.

(*p*) 6 Co. 18, *b*. Treat. on Eq. Pt. 2, c. 1, s. 5.

(*q*) 6 Co. 19, *a*. Godolph. Pt. 2, c. 31, s. 5.

(*r*) Blackborough v. Davis, 1 Salk. 38.

another, upon which an appeal was sued, and both sentences repealed, an assignment of a lease, made by the first administrator in the meantime, was held good (s) : for the repeal was merely of the sentence in the citation, and so it is all one as if the administration had been avoided in the suit upon the citation.

But where an administrator sold a term charged with a trust, in trust for himself, although the administration was revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside (t).

Test whether
administration
void or void-
able.

It may perhaps be laid down as a general test, whether an administration is void or voidable, that, where the grant is in derogation of the right of an executor, it is void : but where the administration is granted by the proper jurisdiction, and is only in derogation of the right of the next of kin, or residuary legatee, it is merely voidable (u).

Payment to an
executor or
administrator
under a void
probate or ad-
ministration is
a discharge.

And even before the passing of 20 & 21 Vict. c. 77, it was held that payment to an executor, who had obtained probate of a forged Will, was a discharge to the debtor, notwithstanding the probate was afterwards declared null in the Ecclesiastical Court (x) ; on the principle that if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed ; and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it.

This, however, was to be understood only where the grant was revoked on citation ; if it were reversed on appeal, the administrator's or executor's authority was suspended by the appeal, and of course such payments would have been void (y).

(s) *Semine v. Semine*, 2 Lev. 90.

(t) *Jones v. Waller*, 2 Chanc. Cas. 129.

(u) However, it has been shown that an administration is not void, but voidable only, where improperly committed after acts of

administration by an executor : *Ante*, p. 227.

(x) *Allen v. Dundas*, 3 T. R. 125, 129.

(y) *Toller*, 131. But see stat. 20 & 21 Vict. c. 77. s. 77, *supra*.

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Dundas, 3 T. R.

31. But see stat.
77. s. 77, *supra*.

Whether the administration be void or voidable, or be revoked on citation or appeal, if an action was brought by the administrator, and while it was pending administration was committed to another, the writ would formerly have abated (z). By sect. 76 of the Court of Probate Act (20 & 21 Vict. c. 77), "where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such Court may direct."

And since the Judicature Acts proceedings commenced by, or against, any administrator, before revocation of the administration, do not become abated, but upon such revocation they may be continued by, or against, the person to whom the new grant of administration is made. An order that the proceedings shall be carried on by or against such new administrator (as the case may be) may be obtained *ex parte* on application to the Court or a judge upon an allegation of the transmission of interest to the new administrator by such grant of administration to him (a).

And if an administrator, before the repeal of the administration, obtain a judgment for a debt due to the intestate, the new administrator, upon the grant to him of administration, may apply to the Court or a judge for leave to issue execution, and the Court or a judge, if satisfied that he is entitled to issue execution upon such judgment, may make an order to that effect (b).

Abatement of suit by administrator by revocation of administration.

20 & 21 Vict. c. 77, s. 76. Suggestion to be made on the record.

No abatement of suit since Judicature Acts.

Modern procedure.

(z) Bro. Administrator, pl. 3. rr. 1-5.

Toller, 131.

(b) R. S. C. 1883, Ord. XLII.,

(a) R. S. C. 1883, Ord. XVII., r. 23.

The administrator under a void grant to be recouped in damages for debts paid, &c., in the course of his administration.

20 & 21 Vict. c. 77, s. 77.

Proper plea by administrator after administration revoked.

It was formerly held that where administration was granted, and afterwards there appeared to be an executor, if the administrator had paid debts, legacies, or funeral expenses, which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, forasmuch as he himself would have been bound to pay it (c). So it was holden in equity, where a widow possessed herself of the personal estate as an executrix, under a revoked Will, and paid debts and legacies, but had no notice of revocation, that she should be allowed those payments (d). And now by stat. 20 & 21 Vict. c. 77, s. 77, it is expressly enacted "that the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made."

It was formerly held that a defendant sued as administrator might plead, that, *pendente brevi*, administration was committed to another (e). With respect to the proper plea, in a case where the administration is revoked before the action commenced; the defendant in *Garter v. Dee* (f), being sued as administrator, pleaded, that before the date of the writ, his administration was revoked and granted to another: *Per Wilde*: He ought to have set forth that he had fully administered all the goods in his hands, or else that he delivered them over to the new administrator (g). If he should be sued as executor *de son tort* (h), and has delivered the assets over

(c) Peckham's case, cited Plowd. 282. Bacon Abr. Exors. (E. 13); and see the authorities mentioned, ante, pp. 221, 222, with respect to an executor *de son tort*. But the contrary seems to have been holden in *Woolley v. Clark*, 5 B. & A. 744. Ante, p. 222, note (a).

(d) *Hele v. Stowel*, 1 Chanc.

Cas. 126, Bac. Abr. Exors. (E. 13).

(e) Bro. Administrator, pl. 3.

(f) 1 Freem. 13.

(g) See also *Palmer v. Litherham*, Latch. 267. *Lawson v. Crofts*, 1 Keb. 114.

(h) See *Turner v. Davies*, 1 Mod. 63, by Kelynge, C.J.

administration was
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l the assets over

before action brought, *plene administravit* seems to have been held to be the proper plea (i).

(i) See *ante*, pp. 218, 219. These cases are retained in this edition of this work because, although they relate to the system of pleading as it existed before the Judicature Acts, they would still

seem to be useful as indicating what facts will constitute a good defence in an action against an administrator, in cases where the administration is revoked before, or pending, action.

Abr. Exors. (E. 13).
administrator, pl. 3.
n. 13.
Palmer v. Lither-
37. Lawson v. Crofts,
ner v. Davies, 1 Mod.
e, C.J.

BOOK THE SEVENTH.

OF THE STAMP DUTIES ON PROBATES, AND ON LETTERS OF
ADMINISTRATION (a).

Stat. 43 Vict.
c. 14.
Grant of
duties on
probates and
letters of
administra-
tion.

BY the Customs and Inland Revenue Act, 1880, 43 Vict. c. 14, section 9, it is enacted that "On and after the first day of April one thousand eight hundred and eighty, in lieu of the stamp duties now payable (b) upon probates of Wills and letters of administration in England and Ireland, and upon inventories to be exhibited and recorded in any Commissary Court in Scotland, there shall be charged and paid the duties specified in the schedule to this Act (c): Provided that an additional inventory to be so exhibited or recorded of any effects of a deceased person, where a former duly stamped inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of April one thousand eight hundred and eighty, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed.

Account to
accompany
affidavit on
application
for probate or

Sect. 10.—(1.) "Together with the affidavit to be required and received from a person applying for a probate or letters of administration in England, in conformity with section thirty-

(a) The subject of the stamp duties on probates and letters of administration before 1880 will be found to be exhaustively dealt with in Hanson's Probate, Legacy, and Succession Duty Acts, 3rd ed., and the law after 1880, in the "Revenue Acts, 1880 and 1881," by the same author.

(b) *I.e.*, those imposed by 55 Geo. III. c. 184, as modified by 22 & 23 Vict. c. 36, and 27 & 28

Vict. c. 56.

(c) This schedule is here omitted, as it is superseded by the scale of duties contained in 44 Vict. c. 12, s. 27, in respect of probates or letters of administrations granted on or after 1 June, 1881. It should be observed that on and after that date stamp duties on affidavits of value are substituted for stamps on the grants themselves.

eight of the Act passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, there shall be delivered an account (d) of the particulars of the personal estate for or in respect of which the probate or letters of administration is or are to be granted, and of the estimated value of such particulars.

letters of administration.

(2.) "The account so delivered shall be transmitted to the Commissioners of Inland Revenue, together with the documents mentioned in section ninety-three of the Act passed in the twentieth and twenty-first years of her Majesty's reign, chapter seventy-seven.

(3.) "A like account shall be annexed to the affidavit to be required and received from the person applying for a probate or letters of administration in Ireland, in conformity with section one hundred and seventeen of the Act passed in the fifty-sixth year of the reign of King George the Third, chapter fifty-six, and such account shall be in lieu of, and in substitution for, the account annexed to the form of affidavit set forth in Part III. of the schedule to the said Act.

(4.) "Every account to be delivered in pursuance of this section shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty's Treasury.

Sect. 11. "Where any legacy duty or succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest shall have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee or other person who would be accountable for the duty in respect of such interest in expectancy, if it were then in possession, to commute the duty (e) pre-

Power to commute legacy duty or succession duty presumptively payable in certain cases.

(d) For form of account, see 44 Vict. c. 12, s. 29, *post*, p. 514.

accept composition for legacy duty under a Will, see 44 Vict. c. 12, s. 43, *post*, p. 521.

(e) As to powers of the Commissioners of Inland Revenue to

LETTERS OF

1880, 43 Vict.
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sumptively payable for a certain sum to be presently paid.

"For assessing the amount which shall be so payable the Commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the Commissioners in respect of duties paid in advance under the Succession Duty Act, 1853.

16 & 17 Vict.
c. 51.

"Upon the receipt of the certain sum the Commissioners shall give a discharge for the duty accordingly.

Discharge of
executor, &c.,
from claim to
duty on dis-
tribution of
fund.

Sect. 12. "When an executor, administrator, or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund.

"Such certificate shall not in any way affect the liability of any person other than the person in whose favour it is expressed to be given.

Relief from
legacy duty
when whole
personal
estate is less
than 100*l*.

Sect. 13. "Where it appears upon an examination of the account rendered to the Commissioners of Inland Revenue that the value of the whole of the personal estate of any person dying after the passing of this Act does not amount to the sum of one hundred pounds, no legacy duty shall be charged in respect thereof or of any portion thereof."

Stat. 44 Vict.
c. 12.

And by the Customs and Inland Revenue Act, 1881, 44 Vict. c. 12, which, as will appear, repeals the scale of duties imposed upon probates and letters of administration granted on or after 1st June, 1881, it is enacted as follows :

Stamp duties
to be under

Sect. 26. (1.) "The stamp duties hereinafter imposed shall

be under the care and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are by law vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying into effect the provisions of this Act in relation to such stamp duties.

the care and management of the Commissioners of Inland Revenue.

(2.) "Such stamp duties may be denoted by impressed or adhesive stamps, or partly by impressed stamps and partly by adhesive stamps, as the said Commissioners may think proper (*f*).

(3.) "As respects the duties imposed on affidavits in substitution for the duties on probates or letters of administration, the several provisions now in force (*g*) in relation to the last-mentioned duties shall, so far as the same are consistent with the provisions of this Act, be deemed to be applicable to the said duties hereby imposed, and in the application thereof a probate or letters of administration having thereon such a certificate as is hereinafter mentioned shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate.

Sect. 27. "The duties imposed by the Customs and Inland Revenue Act, 1880, upon probates of Wills and letters of administration in England and Ireland shall not be payable upon probates or letters of administration granted on and after the first day of June one thousand eight hundred and eighty-one; and on and after that day in substitution for such duties, and in lieu of the duties imposed by the said Act upon inventories in Scotland, there shall, save as is hereinafter expressly provided, be charged and paid on the affidavit (*h*) to

Grant of duties in respect of probate and letters of administration and on inventories.

(*f*) As to cases in which adhesive stamps may be used, see Hanson on the Revenue Acts, 1880, 1881, p. 22.

(*g*) See the provisions of 55 Geo. III. c. 184, *post*, pp. 526, *et seq.*

(*h*) This is the affidavit required by 55 Geo. III. c. 184, s. 38, *post*, p. 526. As to the transmission of this affidavit to the Commissioners and penalty for neglect to do so, see 55 Geo. III. c. 184, s. 39, *post*, p. 527.

be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp duties hereinafter specified; (that is to say,)

Where the estate and effects
for or in respect of which
the probate or letters of
administration is or are
to be granted, or where-
of the inventory is to be
exhibited and recorded,
exclusive of what the
deceased shall have been
possessed of or entitled
to as trustee, and not
beneficially, shall be
above the value of
100*l.* (i), and not above
the value of 500*l.* . . .

DUTY.

At the rate of one pound
for every full sum of 50*l.*,
and for any fractional
part of 50*l.* over any
multiple of 50*l.* ;

Where such estate and
effects shall be above
the value of 500*l.*, and
not above the value of
1,000*l.*

At the rate of one pound five
shillings for every full sum
of 50*l.*, and for any frac-
tional part of 50*l.* over any
multiple of 50*l.* ;

(i) It follows by implication
from this provision that all estates
of or under the value of 100*l.* are
now free from duty. Such estates

were before this Act exempt by
virtue of 27 & 28 Vict. c. 56, s. 5,
post, p. 525.

applying for the
and or Ireland, or
ded in Scotland,
is to say,)

Where such estate and
effects shall be above the

value of 1,000*l.* (k) . . . At the rate of three pounds
for every full sum of 100*l.*,
and for any fractional part
of 100*l.* over any multiple
of 100*l.*;

"Provided that an additional inventory, to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of June, one thousand eight hundred and eighty-one, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed.

Sect. 28. "On and after the first day of June, one thousand eight hundred and eighty-one, in the case of a person dying domiciled in any part of the United Kingdom, it shall be lawful for the person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

"Debts to be deducted under the power hereby given shall be debts due and owing from the deceased and payable by law (l) out of any part of the estate and effects comprised in

Power to
deduct debts
and funeral
expenses where
deceased died
domiciled in
the United
Kingdom.

Duty.

e of one pound
full sum of 50*l.*,
any fractional
50*l.* over any
of 50*l.*;

of one pound five
for every full sum
and for any frac-
t of 50*l.* over any
of 50*l.*;

this Act exempt by
& 28 Vict. c. 56, s. 5,

(k) Where the estate exceeds 10,000*l.*, see stat. 52 Vict. c. 7, s. 5.

(l) As to the meaning of these

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words, which in effect appeared in 5 & 6 Vict. c. 79, s. 23, see *Percival v. The Queen*, 3 H. & C. 217.

the affidavit or inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person.

"Funeral expenses to be deducted under the power hereby given shall include only such expenses as are allowable as reasonable funeral expenses according to law (m).

As to forms of affidavit.

Sect. 29. "The affidavit to be required or received from any person applying for probate or letters of administration in England or Ireland shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debt and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty's Treasury (n); and the Commissioners of Inland Revenue shall provide forms of affidavit stamped to denote the duties payable under this Act.

Probate or letters of administration to bear a certificate in lieu of stamp duty.

Sect. 30. "No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

Provision for return of duty overpaid.

Sect. 31. "If at any time after the grant of probate or letters

(m) As to what funeral expenses are allowable to executors and administrators as against creditors, legatees, next of kin, see *post*,

pp. 836 *et seq.*

(n) For forms approved by the Treasury, see Appendix to Hanson's Revenue Acts, 1880 and 1881.

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probate or letters

of administration (*o*), and during the administration of the estate, the value mentioned in the certificate of the officer of the Court shall be found to exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant, or within such further period as the Commissioners of Inland Revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral expenses, it shall be lawful for the said Commissioners, upon proof of the facts to their satisfaction, to return the amount of stamp duty which shall have been overpaid (*p*), and to cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth such true value, or, as the case may be, the amount, or corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court.

Sect. 32. "If at any time it shall be discovered that the personal estate and effects of the deceased were, at the time of the grant of probate or letters of administration, of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery (*q*), deliver a further affidavit (*r*), with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as

Provision for
payment of
further duty.

(*o*) Applications for return of duty under 55 Geo. III. c. 184, s. 40, had to be made within six months after discovery of overpayment.

(*p*) See stat. 52 Vict. c. 7, s. 5 (6).

(*q*) For penalty of double duty for neglect, see *post*, section 40.

(*r*) As to cases where the estate exceeds 10,000*l.*, see stat. 52 Vict. c. 7, s. 5 (5).

the said Commissioners may, in the circumstances, think proper.

"The Commissioners of Inland Revenue, upon the receipt of such affidavit duly stamped as aforesaid, shall cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court.

Provisions as to obtaining probate, &c., where gross value of estate does not exceed 300*l*.

Sect. 33.—(1.) "Where the whole personal estate and effects of any person *dying on or after the first day of June one thousand eight hundred and eighty-one* (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the Court or to any officer of inland revenue duly appointed for the purpose, a notice in writing in the prescribed form (s), setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of fifteen shillings for fees of Court and expenses, and also, in case the estate and effects shall exceed the value of one hundred pounds, the further sum of thirty shillings for stamp duty.

(2.) "If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the

(s) For the directions issued for the guidance of the Inland Revenue Officers appointed to receive notices of application for grants of probate and letters of administration with or without the Will annexed, as to the particulars required to be

stated in such notices and regulations with respect to the transmission of the same and of the necessary forms and documents, see the Appendix to Hanson's Revenue Acts, 1880 and 1881.

value of three hundred pounds, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(3.) "The principal registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and of the Probate and Matrimonial Division of the High Court of Justice in Ireland, in communication with the Commissioners of Inland Revenue, shall prescribe the form of notice, and make such regulations as may be necessary with respect to the transmission of notices by officers of Inland Revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorise the grant of probate or letters of administration.

(4.) "Officers of Inland Revenue are hereby empowered to administer all necessary oaths or affirmations, and in the case of letters of administration, to attest the bond and accept the same on behalf of the President or Judge of the Division.

(5.) "Where the estate and effects shall exceed the value of one hundred pounds (*t*), the stamp duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of thirty shillings, and no more.

Sect. 34.—(1.) "The Intestates, Widows, and Children (Scotland) Act, 1875, and the Small Testate Estate (Scotland) Act, 1876, as amended by the Sheriffs Court (Scotland) Act, 1876, shall be extended so as to apply to any case where the whole personal estate and effects of a person dying on or after the first day of June one thousand eight hundred and eighty-one, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and

(*t*) In cases where the whole estate does not exceed 100*l.*, see the provisions of the Intestates, Widows and Children Act, 1873

Provision as to inventories where gross value of estate does not exceed 300*l.*, 39 & 40 Vict. c. 24, 39 & 40 Vict. c. 70,

(36 & 37 Vict. c. 52), extended by 38 & 39 Vict. c. 27, *ante*, pp. 248, 249.

the fees payable under Schedule C. of each of the two first-mentioned Acts shall not exceed the sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the commissary clerk, or sheriff clerk.

(2.) "In any such case where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the inventory shall be the fixed duty of thirty shillings, and no more.

Provision in case of subsequent discovery that the value of estate exceeded 300*l*.

Sect. 35. "Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to Her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

Relief from legacy duty in cases under 300*l*.

Sect. 36. "The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this Act shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates.

Power to commissioners to require explanations and proof in support of affidavit or inventory.

Sect. 37. "It shall be lawful for the Commissioners of Inland Revenue at any time and from time to time within three years after the grant of probate or letters of administration or recording of inventory, as they may think necessary, to require the person acting in the administration of the estate and effects of any deceased person, to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit or inventory as the case may seem to them to require.

Grant of duties on accounts of certain property

Sect. 38.—(1.) "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and

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paid on accounts (u) delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:-

(a.) "Any property taken as a *donatio mortis causâ* made by any person dying on or after the first day or June, one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three (x) months before the death of the deceased.

(b.) "Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person.

(c.) "Any property passing under any past or future voluntary settlement (y) made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

(u) Where the value of the 52 Vict. c. 7, s. 11.

estate exceeds 10,000*l.*, see stat. (y) See *Crossman v. The Queen*,
52 Vict. c. 7, s. 5 (2). 18 Q. B. D. 256.

(z) Now "twelve" months. See

(3.) "Where an account delivered duly stamped comprises property passing under a voluntary settlement, and, upon the production of the settlement, it shall appear that the stamp duty of five shillings per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account.

Delivery of
accounts on
oath.

Sect. 39. "Every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or moveable property of a description to be included in an account according to the preceding section shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property duly stamped as required by this Act. Any officer authorised by the Commissioners for the purpose may administer the oath.

Double duty
payable in case
of default.

Sect. 40. "If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inventory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties.

Cesser of
legacy and
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duties at the
rate of one
per cent. in
certain cases.

Sect. 41. "In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four shall not be payable;

"And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty

at the rate of one pound per centum imposed by the Succession Duty Act, 1853, shall not be payable. 16 & 17 Vict. c. 51.

Sect. 42. "Subject to the relief from legacy duty given by section thirteen of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the Will or the intestacy of a person dying on or after the first day of June one thousand eight hundred and eighty-one, although not of an amount or value of twenty pounds, shall be chargeable to the duties imposed by the said Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, as modified by this Act.

Charge of legacy duty on legacies not amounting to 20*l*.

Sect. 43. "It shall be lawful for the Commissioners of Inland Revenue, upon the application of the person acting in the execution of the Will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such will.

Power to Commissioners to accept composition for legacy duty under a Will.

"If the Commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given."

The provisions of the above Act have been supplemented by those of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), by section 5 of which it is enacted that:—

Stat. 52 Vict. c. 7, s. 5.

(1.) "Where, in the case of any person applying for probate or letters of administration granted in England or Ireland on or after the first day of June one thousand eight hundred and eighty-nine, or in the case of any person exhibiting an inventory in Scotland on or after that day, the value of the estate and effects in respect whereof duty is charged on the affidavit or inventory by section twenty-seven of the Customs

Estate duty on personal property passing by Will or on intestacy.

and Inland Revenue Act, 1881, exceeds ten thousand pounds, he shall together with such affidavit or inventory deliver a statement of the value of such estate and effects. The statement shall be transmitted with the affidavit or inventory to the Commissioners of Inland Revenue by the proper officer of the High Court of Justice in England or Ireland, or of the proper Court in Scotland, and the certificate required under section thirty of the said Act shall extend to, and include the fact of the delivery of the statement.

(2.) "Where the value of the personal or moveable property included in an account delivered according to section thirty-eight of the Customs and Inland Revenue Act, 1881, on or after the first day of June one thousand eight hundred and eighty-nine, exceeds ten thousand pounds, the person delivering the account shall also deliver together therewith a statement of the value of such property.

(3.) "Where pursuant to the provisions of section thirty-two of the Customs and Inland Revenue Act, 1881, a further affidavit is required to be delivered by any person, and where any person intromitting with, or entering upon the possession or management of, any personal or moveable estate or effects in Scotland of any person dying, is required by law to exhibit an additional inventory, the following provisions shall apply:—

(a.) "If the value of the estate and effects in respect whereof duty was charged on the former affidavit or inventory under section twenty-seven of the Customs and Inland Revenue Act, 1881, exceeded ten thousand pounds, the person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate and effects included therein or of the increase of value of the estate and effects included in the former affidavit or inventory, as the case may be :

(b.) "If the value of the estate and effects in respect whereof duty has been charged under the Customs

and Inland Revenue Act, 1881, did not exceed ten thousand pounds, and such value together with the value of the estate and effects included in the further affidavit or additional inventory delivered or exhibited or the increased value, as the case may be, exceeds ten thousand pounds, such person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate and effects included therein, and in the former affidavit or inventory, or of the value as increased of the estate and effects included in the former affidavit or inventory, as the case may be.

(4.) "There shall be charged and paid on every statement to be delivered in conformity with this section a duty of one pound for every full sum of one hundred pounds, and for any fraction of one hundred pounds over any multiple of one hundred pounds of the value of the estate and effects or of the personal or moveable property, as the case may be.

(5.) "The duties respectively imposed by this section are to be in addition to the stamp duties charged on the affidavit required from persons applying for probate or letters of administration in England or Ireland or on the inventory exhibited and recorded in Scotland, and in addition to the stamp duties charged on such accounts of personal and moveable property as are specified in section 38 of the Customs and Inland Revenue Act, 1881, as amended by this Act, but are not to be deemed 'probate duties' within the meaning assigned to that expression by section 21 of the Local Government Act, 1888, or by section 5 of the Probate Duties (Scotland and Ireland) Act, 1888.

(6.) "The provisions contained in section 31 of the Customs and Inland Revenue Act, 1881, for the return of stamp duty overpaid shall apply to the return of duty overpaid on any statement delivered under this section, and in Scotland a return of duty overpaid on any statement so

delivered shall be made in like manner as a return is now made of stamp duty overpaid on an additional inventory.

(7.) "Where a further affidavit or additional inventory is delivered or exhibited of any estate or effects of a deceased person after a former affidavit or inventory of the estate and effects of the same person has been delivered or exhibited and recorded prior to the 1st of June, 1889, it shall not be necessary to deliver any statement of the value of the estate and effects of such person under this section.

Duration of
charge of
estate duty.

Sect. 7. "The duties hereinbefore imposed by this part of this Act shall not be payable in respect of the value of the estate and effects of any person dying on or after the first day of June one thousand eight hundred and ninety-six, or of the value of any personal or moveable property included in an account by relation to the death of any person so dying, or in respect of the value of any succession upon the death of any person so dying, and statements of such values shall not be required.

Double duty
or interest
payable in
case of
default.

Sect. 8.—(1.) "If any person who ought to deliver a statement as required by this part of this Act shall neglect to do so, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties.

(2.) "In any case in which any duty hereinbefore imposed by this part of this Act shall be in arrear, the person by whom the arrears of duty may be payable shall be liable to pay interest thereon at the rate of four pounds per centum per annum, and such interest shall be recoverable by the Commissioners of Inland Revenue in the same manner as the arrears of duty and as part thereof: Provided always, that the acceptance or recovery by the said commissioners of arrears of duty, with interest thereon as aforesaid, shall be an absolute waiver of the penalties (if any) which may have been incurred.

The duties to
be stamp
duties.

Sect. 9.—(1.) "The duties hereinbefore imposed by this part of this Act shall be stamp duties, and shall be under the care

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and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying this part of this Act into execution.

(2.) "The statements required to be delivered under this part of this Act shall be in such form as may be prescribed by the Commissioners of Inland Revenue, who shall provide forms accordingly, and the duty on the statement shall be denoted in such manner as the commissioners may think proper."

It will be observed that by section 26 of 44 Vict. c. 12 above set out, the provisions then in force at the time of the passing of that Act with regard to the duties on probate or letters of administration, so far as the same are consistent with the provisions of that Act, are to be deemed applicable to the duties imposed on affidavits in substitution for the duties on probates or letters of administration. It has accordingly been thought convenient to print the former provisions, giving references when necessary to the new Act.

By stat. 27 & 28 Vict. c. 56, s. 4, "The said stamp duties [on probates and letters of administration] shall be charged and paid in respect of the value of any ship or any share of a ship belonging to any deceased person which shall be registered at any port in the United Kingdom, notwithstanding such ship at the time of the death of the testator or intestate may have been at sea or elsewhere out of the United Kingdom; and for the purpose of charging the said duties, such ship shall be deemed to have been at the time aforesaid in the port at which she may be registered.

Sect. 5. "No stamp duty shall be chargeable on any such probate, letters of administration or inventory as aforesaid in any case where the whole estate and effects of the deceased person dying after the passing of this Act (exclusive of what he shall have been possessed of or entitled to as a trustee for any other person or person, and not beneficially) shall be sworn not to

27 & 28 Vict.
c. 56, s. 4.
Duties on
ships.

Sect. 5.
Probates, &c.,
exempted from
stamp duty
where the
effects do not
exceed 100*l*.

exceed, and shall not actually exceed, in value the sum of one hundred pounds" (z).

55 Geo. III.
c. 184.

Exemptions of
Wills and ad-
ministrations
of seamen and
soldiers slain
in battle.

Sect. 37.
Penalty for not
proving Wills,
or taking
letters of ad-
ministration,
within a given
time, 100*l.*,
and 10*l.* per
cent. on the
duty.

Probate of Will, and letters of administration of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of His Majesty, his heirs or successors, are exempt from all stamp duties.

By the 37th section, it is enacted, "That from and after the thirty-first day of August, 1815, if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the Will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased (a).

Sect. 38.
Ecclesiastical
Courts not to
grant probates
or letters of
administration
without affi-
davit of the
value of
effects.

Sect. 38. "From and after the expiration of three calendar months from the passing of this Act (11th July, 1815), no Ecclesiastical Court or person shall grant probate of the Will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the

(z) And since the duties in force on the passing of the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), were by that Act superseded, and since the Customs and Inland Revenue Act, 1881, contains no provision for charging estates of 100*l.* and under, all

estates of or under the value of 100*l.* are now exempt from duty whatever may be the date of the death of the testator or intestate, as the case may be.

(a) See also stat. 5 & 6 Vict. c. 82, s. 35, as to Ireland.

case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased (b).

Sect. 39. "Every such affidavit or affirmation shall be exempt from stamp duty, and shall be transmitted to the said commissioners of stamps, together with the copy of the Will, or extract or account of the letters of administration to which it shall relate, by the registrar or other officer of the Court, whose duty it shall be to transmit copies of Wills, and extracts or accounts of letters of administration to the said commissioners, for the better collection of the duties on legacies and successions to personal estate upon intestacy; and if any registrar or other officer whose duty it shall be, shall neglect to transmit such affidavit or affirmation to the said commissioners of stamps as hereby directed, every person so offending shall forfeit the sum of fifty pounds" (c).

By section 40, it is provided, "That from and after the passing of this Act (11th July, 1815), where any person, on applying for the probate of a Will or letters of administration, shall have estimated the estate and effects of the

55 Geo. III.
c. 184.

Sect. 39.
Affidavits to be free of stamp duty, and to be transmitted to commissioners of stamps.
Penalty for neglect 50*l*.

Sect. 40.
Provision for the case of too high a stamp duty being paid on probates, &c.

(b) As to form of affidavit, see 43 Vict. c. 14, s. 10, and 44 Vict. c. 12, s. 29.

(c) It will be observed that by 44 Vict. c. 12, s. 27, the duty

formerly payable on grants of probate or letters of administration is now payable on the affidavit of value.

55 Geo. III.
. 184.

deceased to be of greater value than the same shall have afterwards proved to be, and shall in consequence have paid too high a stamp duty thereon, if such person shall produce the probate or letters of administration to the said commissioners of stamps within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory and account, and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers; and if it should thereupon satisfactorily appear to the said commissioners that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said commissioners to cancel and expunge the stamp on the probate or letters of administration, and to substitute another stamp for denoting the duty which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps, or if the difference be considerable, to repay the same in money, at the discretion of the said commissioners (d).

Sect. 41.
Provision for
the case of too
little stamp
duty being
paid on probates, &c.

Sect. 41. "From and after the passing of this Act (11th July, 1815), where any person, on applying for the probate of a Will or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said commissioners of stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the

(d) Since 1 June, 1881, these applications will be governed by 44 Vict. c. 12, s. 31.

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sequence have paid
person shall produce
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stamp duty originally paid on such probate or letters of administration: Provided always, That if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained, and it shall be discovered that too little duty was at first paid on the probate or letters of administration, and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said commissioners, that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty, then it shall be lawful for the said commissioners to remit the before-mentioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon (c).

Sect. 42. " Provided always, That in cases of letters of administration, on which too little stamp duty shall have been paid at first, the said commissioners of stamps shall not cause the same to be duly stamped in the manner aforesaid, until the administrator shall have given such security to the Ecclesiastical Court or ordinary by whom the letters of administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained, and also that the said commissioners of stamps shall yearly or oftener transmit an account of the probates and letters of administration, upon which the stamps shall have been rectified in pursuance of this Act, to the several Ecclesiastical Courts by which the same shall have been granted, together with the value of the estate and effects of the deceased, upon which such rectifications shall have proceeded.

Sect. 42.
Administrator
to give the
proper security
to the ecclesi-
astical Court
before admin-
istration is
duly stamped.

(c) Since 1 June, 1881, these applications are governed by 44 Vict. c. 12, s. 32. As to penalty, see 44 Vict. c. 12, s. 40.

55 Geo. III.
c. 184.

Sect. 43.
Penalty on
executors, &c.,
not paying the
full duty on
probates, &c.,
in a given time
after discovery
of too little
paid at first,
100%, and ten
per cent. on
the duty
wanting.

Sect. 44.
Ecclesiastical
Courts not to
take sur-
renders of
probates, &c.,
on the ground
only of wrong
duty paid
thereon.

Sect. 45.
Commiss-
sioners of
stamps may
give credit
for the duty
on probates
and letters of
administra-
tion in certain
cases.

Sect. 43. "Where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration shall not, within six calendar months after the passing of this Act (11th July, 1815), or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said commissioners of stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the sum wanting to make up the proper duty (*f*).

Sect. 44. "From and after the expiration of three calendar months from the passing of this Act (11th July, 1815), it shall not be lawful for any Ecclesiastical Court or person to call in and revoke, or to accept the surrender of any probate or letters of administration, on the ground only of too high or too low a stamp duty having been paid thereon, as heretofore hath been practised: and if any Ecclesiastical Court or person shall so do, the commissioners of stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled.

Sect. 45. "And whereas it has happened in the case of letters of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels real, or other effects due or belonging to the deceased, have been found to be of such great value, that the administrator hath not been possessed of money sufficient either of his own or of the deceased to pay the requisite stamp duty, in order to

(*f*) See *Lacy v. Rhys*, 4 Best & is now provided for by 44 Vict. S. 873, *post*, p. 530. The penalty c. 12, s. 40.

render such letters of administration available for the recovery thereof by law : And whereas the like may occur again, and it may also happen that executors or persons entitled to take out letters of administration may, before obtaining probate of the Will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient either of their own or of the deceased to pay the stamp duty on the probate or letters of administration which it shall be necessary to obtain : " it is enacted, " That from and after the passing of this Act (11th July, 1815), it shall be lawful for the said commissioners of stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped for denoting the duty payable or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before-mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this Act ; provided in all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said commissioners, by a bond to his Majesty, his heirs or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of ten pounds *per centum per annum*, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed : and such probate or letters of administration, being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly.

55 Geo. III.
c. 181.

55 Geo. III.
c. 184.

Sect. 46.
Comis-
sioners may
extend the
credit, if
necessary.

Sect. 46. "Provided always, That if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of administration, it shall appear to the satisfaction of the said commissioners, that the executor or administrator to whom such credit shall be given as aforesaid shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said commissioners to give such further time for the payment thereof, and upon such terms and conditions as they shall think expedient.

Sect. 47.
Probate or
letters of ad-
ministration
stamped on
credit, to be
deposited with
the commis-
sioners.

Sect. 47. "Provided also, That the probate or letters of administration so to be stamped on credit as aforesaid shall be deposited with the said commissioners of stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any shall become due: but the same shall nevertheless be produced in evidence by some officer of the commissioners of stamps, at the expense of the executor or administrator, as occasion shall require.

Sect. 48.
Duty for which
credit shall be
given to be a
debt to the
Crown.

Sect. 48. "The duty for which credit shall be given as aforesaid, shall be a debt to his Majesty, his heirs or successors, from the personal estate of the deceased, and shall be paid in preference to and before any other debt whatsoever due from the same estate; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of five hundred pounds.

Sect. 49.
Provisions for
the case of
letters of ad-
ministration
de bonis non,
taken out be-
fore payment
of the duty for
which credit
shall be given.

Sect. 49. "If before payment of the duty for which credit shall be given in any such case as aforesaid, it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said commissioners to cause such letters of administration *de bonis non* to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty in respect of the effects of the deceased, on some prior probate or letters of administration of the same

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effects in such and the same manner as if the duty had been actually paid, upon having the letters of administration *de bonis non* deposited with the said commissioners, and upon having such further security for the payment of the duty as they shall think expedient; and such letters of administration shall be as valid and available as if the duty for which credit shall be given has been paid."

It has been decided that this section authorizes the commissioners of stamps to stamp letters of administration *de bonis non* on security given, and without payment of the duty, as well in cases where too low a duty has been paid on the original letters of administration, as when such letters of administration have been originally stamped on credit (*g*).

By sect. 50, it is further enacted, in regard to probate of Wills and letters of administration, "That where any part of the personal estate which the deceased was possessed of or entitled to shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said Act of the forty-eighth year of his Majesty's reign (*h*), shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in Scotland, or before one of his Majesty's Justices of the Peace in Scotland, or before a Master in Chancery, Ordinary or Extraordinary in Ireland, or before any Judge or civil Magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a Master in Chancery in England, pursuant to the directions of the said last-mentioned Act."

The statutes 55 Geo. III. c. 184, s. 51; 5 & 6 Vict. c. 79, s. 23; and 24 & 25 Vict. c. 92, s. 3, relate to the return of duty to be made in respect of debts. Formerly the duty was regulated by the *gross* amount or value of the estate, and the

55 Geo. III.
c. 184.

Sect. 50.
Directions
concerning
affidavits by
executors, &c.,
residing out
of England,
relating to
trust pro-
perty.

(*g*) *Doe v. Wood*, 2 Barn. & Ald.
724.

(*h*) See *post*, pp. 534, 535, 536.

deduction in respect of debts could only be obtained in the shape of a return of the duty. Under the existing Acts (Customs and Inland Revenue Acts, 1880 and 1881), the stamp need only be sufficient to cover the *net* value remaining after deducting the debts and funeral expenses of the deceased, so that there is no longer any occasion for a return of duty.

55 Geo. III.
c. 184, s. 8.
Powers and
provisions of
former Acts to
extend to this
Act.

Besides these enactments, it is provided, by statute 55 Geo. III. c. 184, s. 8, "That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several Acts of Parliament relating to the duties hereby repealed, and the several Acts of Parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things charged or chargeable therewith, as far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced and put in execution, for the raising, levying, collecting, and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with, the express provision of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted with reference to the said duties hereby granted" (*hh*).

It is therefore necessary to recur to some of the provisions of the earlier statutes.

48 Geo. III.
c. 149, s. 35.
Probates of
Wills and let-
ters of admin-
istration
valid as to
trust property,
although the
value thereof
be not covered
by the stamp
duty.

By stat. 48 Geo. III. c. 149, s. 35, it is enacted, that "The probate of the Will of any person deceased, or the letters of administration of the effects of any person deceased, &c., &c., shall be deemed and taken to be valid and available by the executors or administrators of the deceased, for recovering, transferring, or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee,

(*hh*) This section has been repealed by the Statute Law Revision Act, 1870, but it seems that

the provisions of former Acts saved by it nevertheless continue in force.

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notwithstanding the amount or value of such debt or debts,
or other personal estate or effects, or the amount or value of
so much thereof, or such interest therein, as was trust
property in the deceased (as the case may be) shall not be
included in the amount or value of the estate in respect of
which the stamp duty was paid on such probate or letters of
administration."

And by s. 36 of the same statute, it is provided, that where
the executors or administrators of any person deceased shall
be desirous of transferring, or of receiving the dividends of
any share standing in the name of the deceased, of and in any
government or parliamentary stocks or funds, transferable at
the Bank of England, or of and in the stock and funds of the
Governor and Company of the Bank of England, or of and in
the stock and funds of any other company, corporation or
society whatever, passing by transfer in the books of such
company, corporation, &c., under any such probate or letters
of administration, and shall allege that the deceased was
possessed thereof, or entitled thereto, either wholly or par-
tially, as a trustee; the bank and any other corporation, &c., or
their officers may, for their indemnity, require an affidavit (i)
or affirmation of the fact, as in s. 37 is mentioned, if it shall
not otherwise appear, and thereupon may permit such execu-
tors or administrators to transfer the stock or fund in
question, and receive the dividends thereof, without regard to
the stamp duty on the probate or letters. And where the
executors or administrators of any person deceased shall have
occasion to recover any debt or other personal estate due to
the deceased, and shall allege that he was possessed thereof,
or entitled thereto, either wholly or partially, as a trustee;
the person liable to pay such debt, may require a like affidavit
as aforesaid, and thereupon make over such debt or effects to
such executors, &c., regardless of such stamp duty as afore-
said; and where the executors, &c., of any person deceased
shall have occasion to assign or transfer any debts due to the

48 Geo. III.
c. 149, s. 36.

Where execu-
tors, &c., al-
lege, that any
property was
vested in the
deceased, as a
trustee, a spe-
cial affidavit
thereof may be
required in the
several in-
stances spe-
cified.

(i) See *ante*, p. 533.

deceased, or any chattels real, or other personal estate, whereof or whereto the deceased was possessed or entitled, and shall allege that the same were due to, or vested in him, either wholly or partially, as a trustee, the person to whom or for whose use such debts, chattels, real, &c., shall be proposed to be assigned, may require such affidavit as aforesaid, and thereupon accept such assignment or transfer, regardless of such stamp duty as aforesaid.

S. 37.
Particulars to
be stated in
such affidavits
by executors,
&c., respecting
trust property.

And by sect. 37 of the same statute, upon any requisition as in sect. 36, such executors or administrators, or some person to whom the fact shall be known, shall make a special affidavit or affirmation of the facts, stating the property in question, and that the deceased had not any beneficial interest in the same, or no other than shall be therein set forth, but was possessed of or entitled thereto, wholly or in part, in trust for some other person, whose name or other description shall be specified, or for such purposes as shall be therein specified, and that the beneficial interest of the deceased, if any, in the property in question, does not exceed a certain value, also therein specified, according to the best estimate that can be made thereof, if reversionary or contingent: and that the value of the estate for which the stamp duty was paid on the probate or letters is sufficient to cover all such beneficial interest, as well as the rest of such personal estate of the deceased, and for which such probate or letters have been granted, as far as the same has come to the knowledge of such executors or administrators; and where such affidavit or affirmation is made by any other person than the executors or administrators of the deceased, they also shall make an affidavit or affirmation that the same is true, to the best of their knowledge, and that the property in question is intended to be applied accordingly: which affidavits or affirmations shall be sworn before a Master in Chancery, and shall be delivered to the party requiring the same, and be sufficient indemnity to them; and if any person making such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of the matters therein contained, such persons

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d, such persons

shall, on conviction, be liable to the pains inflicted on persons guilty of perjury.

By stat. 39 & 40 Geo. III. c. 72, s. 16, Where due proof on oath is made to the commissioners of stamps, (which oath one of such commissioners may administer) that any Will has, through inadvertence, been proved, or that any letters of administration have been taken out on the same property, in more than one Ecclesiastical or Prerogative Court, or more than once in any such Ecclesiastical Court, and by reason thereof more than one stamp duty has been paid, such commissioners may, on delivery to them of the useless probate or letters, to be cancelled, and on production of the valid probate or letters granted on any such Will or property, cancel the useless probate, &c., and stamp any vellum, &c., with stamps of the like denomination and value as those cancelled, without taking any money for the same.

By stat. 41 Geo. III. c. 86, s. 3, after reciting that "it is expedient that the duties payable in respect of probates or letters of administration should not be paid more than once on the same estate;" it is enacted, "that it shall be lawful for the said commissioners of stamps, and they are hereby authorized and required to provide a stamp or mark distinguishable from all other stamps or marks used in relation to any stamp duties, for the purpose of stamping or marking any piece of vellum, parchment or paper, whereon any probate of any Will or letters of administration shall be engrossed, printed, or written, in relation to any estate in respect whereof any probate or letters of administration shall have been before taken out, and the full amount of the duties payable thereon, by any Act or Acts of Parliament then in force, according to the full value of such estate, shall have been duly paid and discharged; and in every case where any probate or probates, or letters of administration, shall have been taken out, duly stamped according to the full value of the estate in respect whereof the same shall have been granted, then, and in such case any further or other probate or letters of administration as aforesaid, which shall be at any time thereafter applied for

39 & 40 Geo.
III. c. 72,
s. 16.
Commis-
sioners of
stamps may
cancel useless
probates of
Wills and let-
ters of admin-
istration, and
allow such
stamps.

41 Geo. III.
c. 86, s. 3. To
prevent the
double pay-
ment of duties,
the Stamp
Office shall
provide a
stamp for
marking
probates of
Wills or letters
of administra-
tion, relating
to any estate
in respect
whereof any
probates, &c.,
shall have
been before
taken out, and
the duties then
payable dis-
charged.

or in respect of such estate, shall and may be issued and granted upon any piece of vellum, parchment, or paper, stamped or marked with the stamp or mark provided by the said commissioners by virtue of this Act for such other probates or letters of administration as aforesaid; and every such other probate or letters of administration, which shall be duly stamped or marked with such stamp or mark as last aforesaid, shall be as available in the law, and of the like force and effect in all respects whatever, as if the vellum, parchment or paper whereon the same shall be engrossed, printed, or written, had been duly stamped with the stamp or mark, denoting the full amount of the duties payable in respect of the probate or letters of administration taken out on the full value of such estate; anything in any Act or Acts, or this Act, before contained, to the contrary thereof in anywise notwithstanding" (k). The statute 28 & 29 Vict. c. 104, ss. 57 and 58, provided for summary proceedings for payment of probate duties.

Probate, &c.,
not properly
stamped, can-
not be given
in evidence :

the stamp
must cover the
claim on
which the
action is
brought.

A very important regulation, as to the consequences of not obtaining the requisite stamp, which was contained in the former Stamp Acts, and re-enacted by section 8 of the stat. 55 Geo. III. c. 184, and all subsequent Stamp Acts, is that no instrument not properly stamped shall be given in evidence (l). Hence, where an executor or administrator brings an action, in which it is necessary for him, at the trial, to prove his representative character, if his case shows that he sues for a greater value than is covered by the stamp of his probate or

(k) See also stat. 5 & 6 Vict. c. 82, s. 36.

(l) Hunt v. Stevens, 3 Taunt. 116. The old statute of 9 & 10 W. III. c. 25, s. 19, first contains the clause enacting this prohibition, and it has been continued through all the succeeding acts: *fb.* The first Act relating to Probate Duty is the stat. 5 W. & M. c. 21, s. 3. Stat. 44 Vict. c. 12, substitutes for the stamp or

a grant a certificate under the hand of the proper officer of the High Court showing that the affidavit has been delivered duly stamped and stating the gross value of the estate thereby shown, and the grant bearing such certificate shall for all purposes be deemed to have been duly stamped in respect of such gross value (s. 26 (3)).

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B & 29 Vict. c.
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letters of administration, he cannot recover; for the instru-
ment, not being properly stamped, cannot be given in
evidence; and he is therefore excluded from the only means
of showing the fact of his being executor or adminis-
trator (m). Nor will it make any difference, that he is suing
for a doubtful claim (n). And it was formerly held that in
a suit in equity a party suing as executor or administrator
could not sustain proceedings to recover a larger sum than
that upon which the probate duty was calculated (o).

But the grant is not void by reason of an original defect of
stamp: and therefore it was held that a commission of bank-
rupt might be supported on a debt due to the petitioning
creditor in the character of executor, although he had not
obtained a probate on a sufficient stamp at the time when the
commission issued, if he afterwards procured the proper
stamp to be affixed to the probate (p).

So where letters of administration had been stamped under
the 41st section of 55 Geo. III. c. 184 (q) (the trial of the
cause having been adjourned, in order to enable the plaintiff
to take advantage of that enactment), it was held, that the
defendant could not object that they had not been stamped
within six months after the discovery of the mistake, so that
a penalty had been incurred under the 43rd section (r), and
the penalty had not been paid (s).

The executor or administrator, it should seem, is bound to
take out the grant to the extent of the sum he expects to
receive (t).

Grant not
void by reason
of an original
defect of
stamp.

Construction
of foregoing
statutes :

(m) *Hunt v. Stevens*, 3 Taunt.
113.

(n) *Ibid.* Carr v. Roberts, 2 B.
& Adol. 906. *Post*, p. 541. See
infra, Pt. v. Bk. I. Ch. I.

(o) *Jones v. Howells*, 2 Hare,
342. Where A. claimed a fund
in Court, as his father's adminis-
trator, but the letters of adminis-
tration were not stamped to a
sufficient amount, the Court re-
fused to grant him a stop-order

until he had procured the letters
to be sufficiently stamped : *Chris-
tian v. Devereux*, 12 Sim. 264.

(p) *Rogers v. James*, 7 Taunt.
147.

(q) *Ante*, p. 528.

(r) *Ante*, p. 530.

(s) *Lacy v. Rhys*, 4 B. & Sm.
873.

(t) *Butler v. Butler*. 2 Phillim.
39.



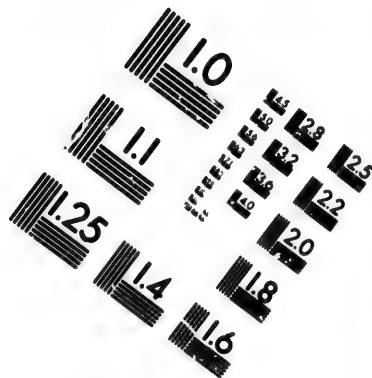
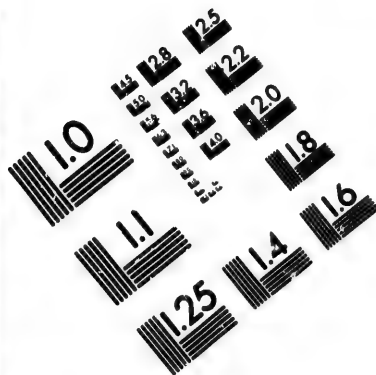
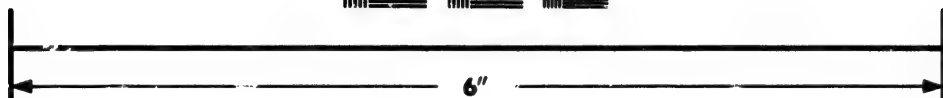
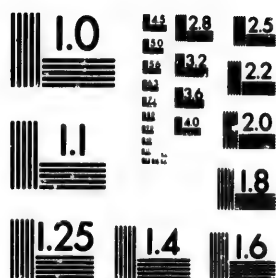


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to what
amount the
grant should
be taken out :

as to debts due
to deceased :

mortgage debt
belonging to
the owner of
the mortgaged
estate :

the stamp
must be of an
amount suffi-
cient to cover
the value as it
stood at the
date of the
grant of letters.

In the case of *Moses v. Crafter* (u), Lord Tenterden held that desperate and doubtful debts need not be included in the amount for which the probate duty is paid ; and that the executor has a right to exercise his judgment fairly and *boni fide*, whether a debt is doubtful or bad (x).

In *Swabey v. Swabey* (y), on the death of a mortgagor, his daughter became entitled, as his heir, to the equity of redemption of an estate which he had mortgaged to the trustees of his own marriage settlement, and under that settlement she also became entitled, as *cestui que trust*, to the mortgage money : The trustees then conveyed the estate to her, subject expressly to the equity of redemption, and did not release her father's covenant for the repayment of the money : Afterwards she granted an annuity, and as a security for it, conveyed the estate and assigned the money to a trustee for the annuitant : By her Will she devised the estate, but did not dispose of her personal estate : and Sir L. Shadwell held, that though, as between her devisee and her next of kin, the latter had no claim to the stock, yet she was, when she died, *cestui que trust* of her father's covenant for repayment ; and that, therefore, the debt remained, and probate as well as legacy duty was payable on it.

The stamp must be of a sufficient amount to cover the value of the assets as it stood, not merely at the time of the death of the deceased, but also at the date of the grant of administration. Thus, in the case of *Doe v. Evans* (z), A. being possessed of a term of years in a house and land, died intestate in 1828 : In 1841, his next of kin took out administration to him : In the meantime B. had been wrongfully in possession, and had built a second house on the demised premises : And

(u) 4 C. & P. 524.

(x) But mere uncertainty as to the amount is no ground for omission. See *Att.-Gen. v. Brunning*, 3 H. L. *per* Ld. Wensleydale, p. 262, 263.

(y) 15 Sim. 502.

(z) 10 Q. B. 476. See also *Attorney-General v. Partington*, 1 Hurlst. & C. 457. Affirmed in error, 3 Hurlst. & C. 193, and subsequently affirmed in the House of Lords. *Sub nom.* *Partington v. Att.-Gen.*, L. R. 4 H. L. 100.

it was held that the stamp on the letters, which was sufficient to cover the value of the lease at the date of the death of the deceased, but not the improved value at the date of the grant of the administration, was insufficient.

If a married woman, entitled as next of kin to the estate of an intestate, dies without asserting her claim, leaving her husband surviving, who also dies without asserting his claim, it is necessary for the next of kin of the husband, in order to enforce the right of the wife and reduce it into possession, to take out letters of administration to both husband and wife, and pay stamp duty on the property for each grant of administration (a).

Case where husband's administrator seeks to enforce a right of his deceased wife.

It will be observed that under the existing statutes, as under 55 Geo. III. c. 184, the *ad valorem* duty is exclusive of what the deceased shall have been possessed of, or entitled to, as a trustee and not beneficially (b). In *Carr, administratrix of Walker v. Roberts* (c), an intestate had granted an annuity to Ann Smith, and afterwards by deed conveyed his property to the defendant, who covenanted to indemnify him against the payment of the annuity: Default having been subsequently made in the payment during the intestate's lifetime, the annuitant sued his administratrix, and recovered judgment for debt and costs exceeding 20l.: The administratrix paid this, and then sued the defendant on his covenant for the amount: It was held that the right to recover this sum was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty; and that the intestate, if he had lived, could not have been considered, in respect of this sum, as a mere trustee for the annuitant, and having no beneficial interest: Lord Tenterden, in giving judgment in this case, after stating the words of the Act, observed, that this provision was made for the exemption of mere trustee, as where property is mortgaged in trust; in which case, if the mortgagee's representative were bound to pay the whole amount of the duty, great injustice

What is trust property within the exemption of 55 Geo. III. c. 184 :

(a) *Ibid.*

(b) *Ante*, p. 512.

(c) 2 B. & Adol, 905.

would be done: Here Walker, the intestate, did not stand in the position of a mere trustee; for he had a beneficial interest in the covenant, since he was liable in the first instance to Smith, and had an interest in obtaining payment of her annuity from the defendant, to relieve himself.

the probate duty is to be regulated by the value of such part of the assets as is within the jurisdiction of the Court which grants the probate or letters of administration :

The law appears to be now settled that, by the terms of the Act of Parliament, the amount of the probate duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the Wills or letters of administration, but by the value of such part as is at the death of the deceased within the jurisdiction of the Court by which the probate or letters of administration are granted (d).

Whatever may have been the origin of this jurisdiction (e), it is clear that it is a limited one, and can be exercised in respect of those effects only which the Ordinary would have had himself to administer in case of intestacy, and which must therefore be so situated as that he could have disposed of them in *pious usus* (f).

the duty is not payable in respect of property in a foreign country belonging to a testator dying in this country although the property be brought into and administered in this country by the executor :

These principles have been adopted in several important decisions respecting the liability to probate duty of the personal property of the testator, which at the time of his death, is in a foreign country, but which, after his death, is brought into this country by his executor. The first of these was the *Att.-Gen. v. Dimond* (g). In that case the

(d) Hence it follows that probate duty attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicile of the testator: *Fernandes' Executors' case*, L. R., 5 Ch. App. 314—317. And in *In the goods of Ewing*, 6 P. D. 23, Sir J. Hannen, in speaking of the share of a deceased partner, stated that in his view it was situate where the business was carried on. As to duty being payable upon assets

on the high seas at the time of the testator's death, see *Att.-Gen. v. Pratt*, L. R., 9 Ex. 140. The question in each case would seem to be whether an English or a foreign probate is necessary to enable the personal representatives to recover the property on which the duty is claimed. *Laidlay v. Lord Advocate*, 15 A. C. 468.

(e) See *ante*, p. 340.

(f) See *ante*, p. 340.

(g) 1 *Crompt. & Jervis*, 356. S. C. 1 *Tyrwh.* 243.

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testator died at Leicester on or about the 10th of May, 1828, and on the 28th June, 1828, the Will was proved in the Prerogative Court of Canterbury, by the executor: The personal property of the testator was sworn to be under the value of 5000*l.*, and a probate duty of 80*l.* only was paid: The testator, at the time of his death, was a creditor of the French Government, to the amount of the annual sum of 32,727 francs, 5 per cent. consolidated, inscribed in the great book of the debt public of France called *rentes*: The personal property of the said testator not including the said *rentes*, was under the value of 5,000*l.*: After the death of the testator, in July, 1828, the executor executed a power of attorney, authorizing Messrs. Mallet, a French house, to sell out the *rentes* in question: This power of attorney, together with a notarial exemplified extract of the clause in the Will appointing the executors, and a notarial copy of the Probate Act, and a notarial certificate of the burial of Paul Francis Benfield, the testator, were produced by Messrs. Mallet to the Bank of France, and the said *rentes* were thereupon sold by them at Paris, under the said power of attorney, and the produce was received by them and transmitted by bills amounting to 27,183*l.* 9*s.* 2*d.* sterling, on account of the executor, to Messrs. Hammersley and Co., bankers of London, and was placed by them to the account of the executor, in his character of executor: and the said Messrs. Hammersley, by his order, as executor, invested the produce of the said bills in Bank Three per Cent. Annuities, in the English funds, in the names of himself and a co-trustee appointed by him, in the room of a co-executor, deceased, where the same still continued: The testator, as well as the executor, was at his death, and during his lifetime, an English subject, and resident in England: The question for the opinion of the Court was, whether the executor was bound to pay a probate duty on the amount of the produce of the said French *rentes*: And the Barons, after taking time to consider, decided in the negative: Lord Lyndhurst, C.B., in delivering the judgment of the Court, observed, that, by the terms of the Act of Parliament, the amount of

the duty is regulated by the value of the estate and effects for or in respect of which the probate is granted; and the question therefore was, for or in respect of what estate and effects was the probate granted in the present instance: that it could not have been granted for or in respect of the property in question, because, at the time of the death of the testator, it was in a foreign country, and, consequently, out of the jurisdiction of the Spiritual Court: And his Lordship distinguished between the liability to probate duty, and that to legacy duty (*h*), inasmuch as it is not the administration of assets which renders the probate duty payable, but the local situation of the assets at the testator's death.

There was, in effect, an appeal from this judgment to the House of Lords, in the case of *The Att.-Gen. v. Hope* (*i*), where the same point arose with respect to moneys standing in the testator's name in the public funds or stock of the United States of America, and debts due to him from persons in that country: But their Lordships, after hearing the case very fully and ably argued, recognized and adopted the decision of the barons of the Exchequer: And Lord Chancellor Brougham, in delivering his opinion to the House, stated that he had made inquiries of the judge of the Prerogative Court (Sir J. Nicholl), and the King's Advocate (Sir H. Jenner), and that they confirmed the view he had taken of the jurisdiction and nature of the Ordinary's office, *viz.*, that probate never has been granted except for goods, which, at the time of the death of the party, were within the jurisdiction of the Ordinary who makes the grant (*k*).

These two cases, in effect, have decided that French *rentes* and American stock, which are part of the national debt of France and America respectively, and are trans-

(*h*) The Court has decided that foreign stock, the property of a testator domiciled in this country, is liable to legacy duty: *In re Ewin*, 1 Crompt. & Jerv. 151.

Infra, Pt. III. Bk. v. Ch. II.

(*i*) 1 Crompt. M. & R. 530. 2 Cl. & Fin. 84.

(*k*) See, however, *Spratt v. Harris* 4 Hagg. 405. *Ante*, p. 300.

ate and effects for granted; and the of wha. estate and ent instance: that in respect of the e of the death of ad, consequently, Court: And his bility to probate uch as it is not the probate duty s at the testator's

judgment to the -Gen. v. Hope (i), moneys standing s or stock of the him from persons after hearing the ized and adopted equer: And Lord opinion to the es of the judge of and the King's ey confirmed the nd nature of the has been granted the death of the the Ordinary who

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wever, Spratt v. Harris Ante, p. 300.

ferable there only, and debts due from persons in America, are not assets locally situated here. So in *Pearse v. Pearse* (l), the testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian Government, the principal and interest of which were payable in India, either in cash or by bills on the East India Company, at the option of the creditor: Shortly before his death, he accepted an offer made by the Company to have his notes converted into stock, to be registered in England, and to be saleable and transferable there: The conversion was not completed at the testator's death, nor until after his Will has been proved in England; but ultimately the stock was transferred to his executors: And Sir L. Shadwell held, on the authority of the *Att.-Gen. v. Hope*, that no probate duty was payable in respect either of the notes or the stock (m).

In the *Att.-Gen. v. Higgins* (n), it was held that the Crown could claim duty, payable in Scotland, under the stat. 48 Geo. III., c. 149, s. 38, in respect of shares in certain public companies in Scotland, which belonged to a testator who was domiciled in England and whose Will had been proved there and the duty duly paid thereon. This case proceeded on the ground that the shares were assets in Scotland and not in England.

And in the *Att.-Gen. v. Bouwens* (o), the Barons of the Exchequer held that probate duty was payable upon the value of Russian, Danish and Dutch government bonds, which were the property of the testatrix, and were, at the time of her death, in the province of Canterbury: The

probate duty on bonds of foreign state:

(l) 9 Sim. 430.

(m) Where a testator directed his bankers in India to realize certain securities and to transmit the proceeds to his bankers in England, which they did by transmitting certain bills payable six months after sight drawn by a bank in India upon a bank in London in

favour of the testator's English bankers, and the testator died while the bills were on their way to England, it was held that probate duty must be paid on the amount of the bills. *Att.-Gen. v. Pratt*, L. R. 9 Ex. 140.

(n) 2 Hurl. & N. 339.

(o) 4 Mees. & Wels. 171.

question was raised upon a special verdict, which gave a description of the instruments, and found that they were marketable securities within this kingdom, transferred by delivery only, and that it never had been necessary to do any act whatever out of the kingdom of England, in order to make a transfer of any of the said bonds valid: And the Barons held, that these securities were to be considered as assets locally situate within the province of Canterbury at the time of the testator's death, and were, therefore, liable to the duty: Their Lordships, at the same time, expressed their opinion that no Ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad and incapable of being transferred here, and therefore that no duty would be payable on the probate or letters of administration in respect of such effects: But that, on the other hand, it was clear that the Ordinary could administer all chattels within his jurisdiction: and if an instrument was created of a chattel nature, capable of being transferred by acts done here and sold for money here, there was no reason why the Ordinary or his appointee should not administer that species of property: That such an instrument was in effect a saleable chattel, and followed the nature of other chattels as to the jurisdiction to grant probate: Here were valuable instruments in England the subjects of ordinary sale; the debtors by virtue of such instruments, if there were any, resident abroad, out of the jurisdiction of any Ordinary, and, consequently, there being no fear of conflicting rights between the jurisdictions who were to grant probate (*p*).

the duty is not
payable on

These principles were also recognized and acted on by

(*p*) It may be proper to remind the reader, that judgment debts are assets for the purposes of the jurisdiction of the Ordinary, where the judgment is recorded; leases

where the land lies; specialty debts where the instrument happens to be; and simple contract debts where the debtor resides at the time of the testator's death: (See

Lord Langdale, M.R., in *Matson v. Swift* (q), where his Lordship held that no probate duty was payable in respect of land directed to be converted into money: And the learned Judge adverted to the two-fold character of the probate, which, besides granting administration, authenticates the Will, and is evidence of the character of executor; so that the probate may be required for the purpose of proving the executor's title to personal estate, which may not be comprised in the grant of administration contained in the same probate. This decision was relied on by Wigram, V.-C., in *Custance v. Bradshaw* (r), where his Honour held that the share of a deceased partner in the freehold and copyhold estates of the partnership is not personal estate for the purpose of being included in the value or amount in respect of which probate duty is payable.

land directed to be converted into money :

In supposed accordance with these decisions, the case of the *Attorney-General v. Brunning* (s) was decided by the Court of Exchequer. There a testator having by a valid contract agreed to sell a freehold estate for 115,000*l.* and received a deposit of 15,000*l.* in his lifetime, the contract was specifically performed, and the remainder of the purchase-money paid to his executor after his death: And the Barons held that probate duty was not payable in respect of any portion of the 115,000*l.* as part of the personal estate of the testator.

Secus, as to the price of land contracted to be sold :

But this decision was reversed by the House of Lords (t),

1 Saund. 274 a, note (3): The instruments in question were incorrectly called bonds, not being under seal, but being merely certificates of the rights of the holders to claim the amounts therein specified from the respective governments.

(q) 8 Beav. 368.

(r) 4 Hare, 315. But of this case Brett, M.R., said, "I am of opinion that in a Court of Law *Custance v. Bradshaw* ought never

to be cited again as an authority." *Att.-Gen. v. Hubbuck*, 13 Q. B. D. 275, 289.

(s) 4 H. & N. 95.

(t) 8 H. of L. 243. *Re De Lancey*, L. R. 5 Exch. 102. Where a testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue, who became entitled to the bequest under sect. 33 of Wills Act, it was held that the executors of the son were chargeable with probate duty on

who acted on the principle that all moneys recoverable by the executors by virtue of the probate, in whatever form recovered, whether through the agency of a Court of Equity or of a Court of Law, are part of the estate and effects of the testator, and are liable to probate duty: and *Matson v. Swift and Custance v. Bradshaw* were distinguished on the ground, that in neither of those cases was there any change in the nature of the property created by the obligation of a binding contract, and the property in question remained real estate at the death of the testator;—whereas in the present case, there was a contract binding on the testator and on the purchaser by virtue of which the former had a right to the stipulated purchase-money on completing the purchase, the latter had a like right to the estate; so that in equity, the testator at the time of his death had a claim for 115,000*l.*, in the event of a good title being made out, and that claim devolved on the executor (*u*).

In *Att.-Gen. v. Lomas* (*x*) this case was followed, and it was held that, when a Will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitations of the proceeds contained in the Will, the testator's heir takes the undisposed-of interest, he takes it as money, and on his death probate duty is payable upon it, though the land remains unsold.

the amount of the bequest in the same manner as they would have been had the son actually survived the father: *Executors of Perry v. The Queen*, L. R. 4 Ex. 27.

(*u*) See also *Forbes v. Steven*, L. R. 10 Eq. 178, in which case, after consideration of the above cases, it was held that legacy duty was payable upon the share of a deceased partner in the proceeds of freehold property used for the purposes of the partnership, and forming a partnership asset. And see the provision of the new Part-

nership Act, 1890 (53 & 54 Vict. c. 39, sect. 22), that where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appear, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators as personal or moveable, and not real or heritable estate.

(*x*) L. R., 9 Exch. 29.

Again, in the case of *Att.-Gen. v. Hubbuck (y)*, it was held that the shares of partners in realty forming part of partnership property, must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary, and probate is payable on a deceased partner's share in such realty irrespective of the question, whether or not there is, in the event, any actual conversion into personalty. In this case the learned Judges in the Court of Appeal cite, with approval, the judgment of Lord Cranworth in *Att.-Gen. v. Brunning*, when dealing with the cases of *Matson v. Swift* and *Custance v. Bradshaw*, and distinguishing them from that case. The principle contained in the above cases seems to be that "the character that is impressed upon property by law at the time when the breath leaves the body of the owner is its character for the purpose of the fiscal duties which are alleged to attach upon it" (z).

and as to real property of a partnership.

In the case in the House of Lords of *Att.-Gen. v. Ailesbury (a)*, money of a lunatic was invested by his committees by order of the Lords Justices having jurisdiction in Lunacy, in purchases of lands which, under their Lordships' direction, were conveyed to the committees, "their heirs and assigns, upon trust for" the lunatic, "his executors, administrators, and assigns," with a declaration that the lands so conveyed (and all others to be purchased in lieu of them) under any exercise of certain powers of sale and reinvestment which were contained in the deed should, "to all intents and purposes be considered as part of the personal estate of" the lunatic. Upon the death of the lunatic, who never recovered, it was held that the value of the lands was part of the *personal* estate of the lunatic at his death and liable to probate duty.

Where freehold property is, by the doctrine of Equitable Conversion, to be considered as personalty, it is liable to

(y) 13 Q. B. D. 275, affirming S. C., 10 Q. B. D. 488.

(z) *Per* Lord Coleridge in *Att.-Gen. v. Hubbuck*, 13 Q. B. D. 275, 280.

(a) 12 App. Cas. 672, reversing the decision of the Court of Appeal, 16 Q. B. D. 408, and restoring the decision of *Mathew and A. L. Smith, JJ.*, 14 Q. B. D. 895.

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probate duty, and a Will disposing of it is therefore entitled to probate (b).

23 & 24 Vict.
c. 15, s. 4.
Personal estate appointed by Will under general powers to be chargeable with probate and inventory duties.

By stat. 23 & 24 Vict. c. 15, s. 4 (c), "The stamp duties payable by law upon probates of Wills and letters of administration with a Will annexed in England and Ireland, and upon inventories in Scotland, shall be levied and paid in respect of all the personal or moveable estate and effects which any person hereafter dying shall have disposed of by Will, under any authority enabling such person to dispose of the same, as he or she shall think fit; and for the purpose of this Act such personal or moveable estate and effects shall be deemed to be the personal or moveable estate and effects of the person so dying in respect of which the probate of the Will, or the letters of administration with the Will annexed, of such person are or is granted, or the inventory is or is required to be exhibited or recorded, as the case may be; and such estate and effects, and the value thereof shall accordingly be included in the affidavit required by law to be made on applying for probate or letters of administration, in order to the full and proper stamp duty being paid."

Probate and inventory duties in respect thereof to be a charge on the property.

Sect. 5. "The said last-mentioned duties shall be a charge or burden upon the property in respect of which the same are so payable, and shall be paid thereout by the trustees or owners thereof to the person for the time being lawfully having or taking the burden of the execution of the Will or testamentary instrument, or the administration or management of the personal or moveable estate and effects of the deceased, for the benefit of the persons entitled to the personal or moveable estate and effects of the deceased."

(b) In the goods of Gunn, 9 P. D. 242.

(c) This statute applies to the Wills of persons dying after 3 April, 1860. Prior to this statute probate duty was not payable in respect of property over which the testator had merely a power of

appointment. *Platt v. Routh*, 6 M. & W. 756, affirmed in the House of Lords, sub nom. *Drake v. Att.-Gen.*, 10 Cl. & Fin. 257. The contrary had previously been held in *Palmer v. Whitmore*, 5 Sim. 178, and in *Att.-Gen. v. Staff*, 2 Cr. & M. 124.

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 ade, sub nom. Drake v.
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 Whitmore, 5 Sim.
 Att.-Gen. v. Staff, 2

PART THE SECOND.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF THE TIME WHEN THE ESTATE OF AN EXECUTOR OR ADMINIS-
 TRATOR VESTS: AND OF THE QUALITY OF THAT ESTATE.

In considering the nature of the estate which an executor or administrator has in the property of the deceased, it is proposed to inquire, 1. At what time his estate vests; 2. The quality of his estate.

CHAPTER THE FIRST.

OF THE TIME WHEN THE ESTATE OF AN EXECUTOR OR
 ADMINISTRATOR VESTS.

AS the interest of an executor in the estate of the deceased is derived exclusively from the Will (a), so it vests in the executor from the moment of the testator's death (b). Thus where the demise by an executor, the lessor of the plaintiff in ejectment, was laid two years before he had proved the Will under which he claimed, it was held good (c). So where a testator had given a bailiff authority to distrain, but died almost immediately before the distress was taken: and, after

Estate of
 executor.

(a) *Ante*, p. 243.

A. 745, 746.

(b) Com. Dig. Administration

(c) *Roe v. Summerset*, 2 W.

(B. 10). *Woolley v. Clark*, 5 B. &

Black, 692.

it had been taken in his name, his executor ratified the distress; it was held that the plaintiff might well avow as the bailiff of the executor: because the rent was due from the estate, and the law knows no interval between the testator's death and the vesting of the right in his executor: as soon as he obtains probate, his right is considered as accruing from that period (*d*).

Estate of administrator.

On the other hand, an administrator derives his title wholly from the Court: he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (*e*).

Accordingly, no right of action accrues to an administrator until he has sued out letters of administration. In an action on a bill of exchange by an administrator, where the bill was accepted after the death of the deceased, and the acceptance, and also the day of payment, was more than six years before the commencement of the suit, but the granting of administration was less than six years before, it was held that the Statute of Limitations began to run from the date of administration, and not from the day of payment, since there was no cause of action until the administration was granted (*f*). So where to a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, afterwards, and after the death of the intestate, to wit, on, &c., converted the same goods, it was pleaded that the defendant was not guilty of the premises within six years, such plea was held bad upon special demurrer, on the ground, that although it might be true that the defendant was not guilty within six years, yet the cause of action might have accrued

(*d*) *Whitehead v. Taylor*, 10 A. & E. 210.

(*f*) *Murray v. E. I. Company*, 5 B. & A. 204. *Post*, Pt. v. Bk. I.

(*e*) *Woolley v. Clark*, 5 B. & A. 745, 746. Ch. I.

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e. E. I. Company,
Post, Pt. v. Bk. I.

to the plaintiff by the grant of letters of administration within that period (g).

The proposition, however, respecting the vesting of an administrator's interest, must be taken with some qualification; for it seems clear that, for particular purposes, the letters of administration relate back to the time of the death of the intestate, and not to the time of granting them (h). Thus, although it has been held that detainee cannot be maintained by an administrator against a person who has got possession of the goods of the intestate since his death, but has ceased to hold them prior to the grant of administration (i), yet an administrator may have an action of trespass (j) or trover for the goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for this wrong-doing (k). So where goods had been sold after the death of an intestate and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee in assumpsit for goods sold and delivered (l). And accordingly it should seem that whenever any one acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so that the administrator may sue upon it, as made to himself (m). And so if, during the time when there is no personal representative of the estate of a deceased person,

(g) Pratt v. Swaine, 8 B. & C. 825.

285.

(h) Gor' Pt. 2, c. 20, s. 6.

2 Roll. Ab., 399, tit. Relation (A.),

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(T.), pl. 1. Middleton's case, 5

Co. 28 & Com. Dig. Administra-

tion (B. 10). Watw. Off. Ex.

113, 116, 14th edition.

(i) Crossfield v. Such, 8 Exch.

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(j) Tharpe v. Stallwood, 5 M. & Gr. 760.

(k) Foster v. Bates, 12 M. & W.

233, per Parke, B. Searson v.

Robinson, 2 Fost. & F. 351.

(l) Foster v. Bates, 12 M. & W.

226.

(m) Bodger v. Arch, 10 Exch.

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services have been rendered which not only were for the benefit of the estate, but also were rendered under a contract with some one who subsequently by becoming administrator became authorised to bind the estate, and ratified the contract, the estate of such deceased person is liable for such services (*n*). Further, it has been held on the bare doctrine of relation, that in a case where the administrator might maintain trover for a conversion between the death of the intestate and the grant of administration, he may waive the tort and recover as on a contract: Thus, where money belonging to an estate at the time of his death, or due to him and paid in after his death, or proceeding from the sale of his effects after his death, has, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the administrator may recover it from such stranger as money had and received to his use as administrator (*o*). So it should seem the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property, for all matters affecting the same subsequent to the death of the intestate, and so as to render him liable to account for the rents and profits of it from the death of the intestate (*p*).

(*n*) *Re Watson, Ex parte Phillips*, 18 Q. B. D. 116, affirmed in the Court of Appeal, 19 Q. B. D. 234. See, however, the remarks of Lord Esher, M.R., in his judgment on appeal, who doubted whether an administrator after becoming administrator, and while acting in the interests of other persons, could have ratified a prior contract made with himself.

(*o*) *Welchman v. Sturgis*, 13 Q. B. 552.

(*p*) *Rex v. Horsley*, 8 East, 410, in Lord Ellenborough's judgment. So it is laid down in *Selw. N. P.* 717, 6th edition, that in ejectment

by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted; for the administration, when granted, will relate back, and show the title to have been in the administrator from the death of the intestate. This point was expressly decided accordingly, by the Court of K. B. in Ireland, after a full consideration, in *Patten v. Patten*, T. 3 W. 4. 1 Alcock & Napier, 493: and Bushe, C.J., in delivering judgment, regards this decision as reconcilable with that of *Keane v. Dee* (K. B. Ireland, June, 1821), 1 Alcock & Napier,

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Again, although an executor *de son tort* cannot plead a retainer of his own debt, yet if, even *pendente lite*, he obtains administration, he may retain: for it legalizes those acts which were tortious at the time (q). And there has been already occasion (r) to point out other acts of an administrator before administration granted, which the relation of the letters in some measure renders valid. But the relation of the grant of administration to the death of the intestate, shall not, it is said, divest any right legally vested in another between the death of the intestate and the commission of administration. Thus, in *Waring v. Dewbury* (s), a landlord who had rent due to him, died intestate; after which the plaintiff in the action sued out execution against the defendant, who was the tenant, and levied the debt upon him; after this, administration was committed to J. S.; who thereupon came into the Court, and moved for a rule on the sheriff to pay him a year's rent out of the money levied, pursuant to the 8 Ann. c. 17, urging, that though he was not administrator at the time of serving the execution, yet as soon as the administration was committed, it had relation to the death of the intestate, and he might bring trover for goods taken between the death of the intestate and commission of the administration: But the Court held, that relations which are

486, note (1), in which case it had been holden that an administrator could not justify a distress for rent (accrued out of a chattel term of the intestate after his death) made before the grant of the administration, on the ground that although letters of administration will operate by relation, to enable an administrator to recover a chattel property from the time of the death of the intestate, yet it does not effectuate a *legal proceeding*, taken before administration granted, in order to recover such property. See, however, *Bacon v. Simpson*, 3 Mees. & Wels. 57, in

which case an administratrix, before she had taken out administration, had contracted to assign a term for years of the intestate in a leasehold house; and Parke, B., was of opinion, that an allegation, that she was lawfully possessed of the term at the time of the making of the contract, could not be supported. See also *ante*, pp. 342, 343.

(q) *Curtis v. Vernon*, 3 T. R. 587, 590.

(r) *Ante*, pp. 344, 345.

(s) *Gilb. Eq. Rep.* 223, cited by *Strange, arguendo*, in *Rex v. Maun*, S. C. 1 Stra. 97.

but fictions of law, should never divest any right legally vested in another, between the death of the intestate and the commission of administration; and the plaintiff in the action having duly served his execution, before the administrator had a right to demand his rent, it was not reasonable the plaintiff should be defeated by any relation whatsoever; they did not in that case deny the authorities which gave the administrator trover, but went on a distinction between relations that are to defeat lawful acts, and such as are to punish those that are unlawful (t).

Relation back of title where the deceased had only a special property.

There appears, in some instances, to be the same relation back of the title of the personal representative in cases where the deceased had only a special property in the goods as where he had the absolute property. Thus, if an uncertificated bankrupt acquired goods after his bankruptcy, and died possessed of them, having been allowed to retain possession by the assignees, his administrator might maintain trover against a third party who had sold the goods between the period of the death of the intestate and the grant of the administration; for there was a good title in the bankrupt as against all the world but the assignees, and this title passes to his administrator (u). But there is no such relation back as to chattels in which the deceased had no personal interest, but held merely as the administrator of another: The bare circumstance of his dying in possession will not enable his personal representative to maintain trover even against a mere wrongdoer; for it will be a good defence that the right to the goods in question has devolved on the administrator *de bonis non* of the original intestate (x).

3 & 4 Will. IV. c. 27. Admi-

By stat. 3 & 4 Wm. IV. c. 27 (entitled *An Act for the*

(t) See also *Rex v. Horsley*, 8 East, 405, *post*, p. 566, note (m). The rule that a party cannot be made a trespasser by relation is only applicable where the act complained of was lawful at the time:

Tharpe v. Stallwood, 5 M. & Gr. 760.

(u) *Fyson v. Chambers*, 9 M. & W. 460.

(x) *Elliot v. Kemp*, 7 M. & W. 306.

Limitation of Actions and Suits relating to real property, &c.), s. 6, it is enacted, that "for the purposes of this Act an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person, and the grant of the letters of administration."

By 21 & 22 Vict. c. 95, s. 19, "From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being in the same manner and to the same extent as heretofore they vested in the Ordinary."

All moveable goods, though in ever so many different and distant places from the executor, vest in the executor in possession, presently upon the testator's death (*y*): for it is a rule of law, that the property of *personal* chattels draws to it the possession (*z*). But it is otherwise of things immoveable, as leases for years of lands or houses: for of these the executor or administrator is not deemed to be in possession before entry (*a*). So of leases for years of a rectory, consisting of glebe lands and tithes for years, it may be doubtful if actual possession can be without actual entry into the glebe land (*b*). But in case of a lease for years of tithes only, it was held that the executor, though in never so remote a place, should instantly, upon the setting out thereof, be in actual possession to maintain action of trespass for taking them away (*c*).

(*y*) Wentw. C.F. Ex. 228, 14th edit. 11 Vin. Abr. 240.

(*z*) 2 Saund. 47, b. n. (1), to Wilbraham v. Snow.

(*a*) Wentw. Off. Ex. 228, 14th edit. See the observations of Parke, R., in Barnett v. Earl of Guildford, 11 Exch. 32. But a reversion of a term, which the

testator granted for a part of the term, is in the executor immediately by the death of the testator: Trattle v. King, T. Jones, 170.

(*b*) Wentw. Off. Ex. 229, 14th edit. 11 Vin. Abr. 240.

(*c*) *Ibid*.

nistrator to claim for purpose of this Act, in actions relating to real property, as if he obtained the estate without interval after death of deceased.

21 & 22 Vict. c. 95, s. 19. Between the death of the deceased and the grant of administration property to vest in the Judge Ordinary:

distinction between chattels real and personal as to time of vesting in possession.

CHAPTER THE SECOND.

OF THE QUALITY OF THE ESTATE OF AN EXECUTOR OR
ADMINISTRATOR.

THE interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods (a): For an executor or administrator has his estate as such in *auter droit* merely, viz., as the minister or dispenser of the goods of the dead (b).

The goods of the deceased not forfeited by attainder of executor, &c.

Therefore, if before the Act 83 & 84 Vict. c. 23, for the abolition of forfeiture for Treason and Felony, an executor or administrator had been attainted of treason or felony, the goods which he had as executor or administrator would not thereby have been forfeited (c): and though disabled by such attainder from suing *proprio jure*, he might still have maintained an action in *auter droit* as executor or administrator (d).

not applicable to the debts which the executor owes the Crown.

So, where an executor brought a *quo minus* in the Court of Exchequer, stating that he was not able to pay the King's debt, because the defendant detained from him 100*l.* which he owed to him as executor of J. S., it abated: because it could not be intended that the King's debt could be satisfied with that which the plaintiff should recover and receive as executor (e).

(a) Wentw. Off. Ex. 192, 14th edit.

(b) Pinchon's case, 9 Co. 88, b. 2 Inst. 236. An executor has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfil in

the course of his office as executor: by Ashhurst, J., *Farr v. Newman*, 4 T. R. 621, 645.

(c) 1 Hale, P. C. 251. Hawk. P. C. Bk. 2, c. 49, s. 9.

(d) *Ante*, p. 186.

(e) Wentw. Off. Ex. 194, 14th edit.

So though a lord of a villain might take all the villain's own goods, yet he might not take those which the villain held as executor (*f*).

Upon this principle also, if the executor or administrator becomes bankrupt, with any property in his possession belonging to the testator or intestate, distinguishable from the general mass of his own property, it is not distributable under the bankruptcy (*g*). The trustee cannot seize even money which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself (*h*). But where a person entitled to take letters of administration neglected to do so, yet remained in possession of the goods of the intestate for twelve years, and being so in possession became a bankrupt; and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees; it was held that these goods were within the stat. 21 Jac. I. c. 19, being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner: and that the assignees were therefore entitled to them (*i*). So where an innkeeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock in trade, and carried on her business in their own names for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and, at the end of that time, became bankrupts, the daughter having a few months previously retired from the business, and sold

Where the executor becomes bankrupt, the goods of the testator do not pass:

(*f*) Lit. L. 2, c. 11, s. 192.

(*g*) See Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, § 44 (1).

(*h*) By Lord Mansfield in *Howland v. Jemmett*, 3 Berr. 1369, cited by Lord Kenyon, in *Farr v. Newman*, 4 T. R. 621, 648. Under the bankruptcy of an executor and trustee, directed by the Will to carry on a trade, and a limited

sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable: *Ex parte Garland*, 10 Ves. 110. See *post*, Pt. iv. Bk. II. Ch. II. § 1.

(*i*) *Fox v. Fisher*, 3 B. & A. 135; *Kitchen v. Ibbetson*, L. R. 17, Eq. 46.

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EXECUTOR OR

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R. 621, 645.
P. C. 251. *Hawk.*
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Off. Ex. 194, 14th

her share of it to the son: Another of the children then took out administration to the intestate, and claimed that part of her furniture and stock in trade which still remained in specie: But it was held that it belonged to the assignees, as having been in the order and disposition of the son at the time of his bankruptcy (*k*).

proviso for
forfeiture of
lease, if lessee
or his executor
shall become
bankrupt:

It must be observed, that if the testator were a lessee for years, and the lease contained a proviso that if the lessee, or his executors, administrators, or assigns, shall become bankrupt, the lease shall become void, the bankruptcy of the executor will operate as a forfeiture of the lease, notwithstanding the lease itself does not pass to his assignees (*l*).

receiver ap-
pointed to
whom assign-
ees shall
account:

Where a trustee in bankruptcy possesses himself of effects, which belong to the bankrupt as executor only, the Court, upon application made to it, will order the return of such effects to the bankrupt, or will, if necessary, appoint a receiver (*m*). Where a bankrupt is an executor and residuary legatee, and has paid the debts and particular legacies out of part of the assets, if he refuses to collect the rest, notwithstanding trustee in bankruptcy has not the legal interest vested in him, the Court will assist him to get in the remainder in the name of the executor (*n*).

The goods of
the testator
cannot be
taken in
execution for
the debt of the
executor.

Again, the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right (*o*). So if an executor dies

(*k*) *Re Thomas*, 1 Phill. C. C. 159. It is to be observed that under the Bankruptcy Act, 1883, § 44 (2), iii., reputed ownership is limited to goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent or permission of the true owner. It must be noticed that things in action, other than debts due or growing due to the bankrupt in

the course of his trade or business, are not "goods" within the meaning of this section.

(*l*) 1 Cr. M. & R. 405.

(*m*) As to the powers exercisable by the Court as regards a trustee in bankruptcy, see the cases of *Ex parte James*, L. R., 9 Ch. 609, and *Ex parte Simmons*, 16 Q. B. D. 308.

(*n*) *Ex parte Butler*, 1 Atk. 213.

(*o*) *Farr v. Newman*, 4 T. R. 621, where all the former autho-

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indebted, leaving to his executor goods which he had as
 executor, these are not assets liable to the payment of his
 debts, but only for the payment of the first testator's (p).
 But when an executrix used the goods of her testator as her
 own, and afterwards married and then treated them as the

ties are collected and discussed. In this case, Buller, J., dissented from the rest of the Court, viz. Lord Kenyon, and Ashhurst and Grose, Justices. The action was against the Sheriff for a false return, and the question was, whether certain goods of the testator, which had been seized by the sheriff under an execution against the husband of the executrix, in a house in which the husband and wife resided, and the testator had resided, but which had not been sold under the execution, were bound by it. In a previous case, *Whale v. Booth*, B. R. 25 Geo. III. 4 T. R. 683, note (a), where the goods of the testator had actually been sold under a *fi ri facias* against the executor for his own debt, and the executor joined in a bill of sale, it was held by the Court of K. B. that the property passed by the execution, and could not afterwards be seized under a writ sued out by a creditor of the testator; upon the principle that the sale under the execution could not be distinguished from an alienation by the executor. But although the two cases may thus in some degree be reconciled, Eyre, C.J., in *Quick v. Staines*, 1 Bos. & Pul. 295, considers them as entirely conflicting, and the law as still unsettled. See also the observations of Sir Thomas Plumer, V.-C., in *Ray v. Ray*, Coop. 267. However, Lord Eldon, C., in *McLeod v.*

Drummond, 17 Ves. 168, adverts to *Farr v. Newman*, as having decided absolutely, that the effects of the testator cannot be taken in execution for the debt of the executor, and expresses his satisfaction with that decision. See also *Kinderley v. Jervis*, 22 Beav. 23, per Romilly, M.R. See *infra*, Pt. III. Bk. I. Ch. I., as to the power of an executor to dispose by sale of the goods of his testator. If an executor, in pursuance of the directions in the testator's Will, carries on the testator's business and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time, and an enjoyment of the assets in a manner inconsistent with the trusts of the Will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the Will, no such inference can arise: *Re Morgan*, 18 C. D. 93.

(p) *Wentw. Off. Ex.* 194, 14th edit.

property of her husband, it was held, that she could not be allowed to object to their being taken in execution for her husband's debt: for where an executrix or her husband have converted the goods, it does not lie in the mouth of either of them to say they are not the property of the husband, in a case between the executrix and one of his creditors (*g*). So after a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution property of the testator which is assets in equity (*r*). However, where goods of an intestate had been taken possession of, and used by an administrator, in the house of the intestate, for three months after the death of the intestate, Lord Tenterden held that they could not be taken in execution for the administrator's own debt, the time, in this case, not being sufficient to make the goods the administrator's property (*s*).

Merger :

With reference also to the principle, that an executor or administrator holds the property of the deceased *in autre droit* merely, it has been laid down, that in respect to land, no merger can take place of the estate held by a man as executor in that which he holds in his own right (*t*). However, in the former editions of this work the authorities were referred to at length in support of an important distinction, apparently well sustained, between the cases in which either of the two estates was an accession to the other by *act of law*, when no merger would take place, and those where the accession was by *act of the party*, when the less estate would merge.

(*g*) *Quick v. Staines*, 1 Bos. & Pull. 293.

(*r*) *Ray v. Ray*, Coop. Chanc. Cas. 264. Upon this case in his judgment in *Re Morgan*, 18 C. D. 93, 101, Fry, J., remarks that "the Court thought the circumstances were such as to raise an inference of a gift by the testator's creditor to the executor."

(*s*) *Gaskell v. Marshall*, 1 Mood. & Rob. 132. S. C. 5 C. & P. 31. The learned judge, upon *Quick v. Staines* being cited, observed that the marriage in that case made all the difference.

(*t*) 2 Black. Comm. 177. *Jones v. Davies*, 5 H. & N. 767. See *Chambers v. Kingham*, 10 C. D. 743.

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 & N. 767. See
 ngham, 10 C. D.

But with respect to assets the distinction was considered immaterial. In case of purchase, as of descent, all, says L. C. B. Gilbert, agree that the term would not be extinct as to creditors. And as it would seem that in no case would the term held by an executor or administrator have been considered to merge in equity, the learning on the subject appears to be rendered obsolete by the Judicature Act, 1873, s. 25, sub-sect. 4, which enacts that "there shall not after the commencement of this Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." And sub-sect. 11 provides that "generally in all matters not heretofore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."

It may be observed in this place, with respect to the continuance of the privilege from merger, that, though a person is originally entitled to a term, or to an estate of freehold, as an executor or administrator, yet in process of time he may become the owner of that estate in his own right (u). This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the Will, and holds the estate as legatee; or when the executor pays money of his own, to the value of the term, in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of the money: And in the case of administrators, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid: Under these, and the like, circumstances the executor or administrator will have the estate in his own right; and when he has the estate in his own right, it will be subject to merger (x).

(u) See *post*, p. 566, *et seq.*

(x) 3 Preston on Conv. 310, 311.

Generally speaking, it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. This only is certain, that when the executor or administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger (*y*).

An executor cannot bequeath the goods of his testator to a legatee :

Since no man can bequeath any thing but what he has to his own use, an executor cannot by his Will dispose of any of the goods which he has as executor to a legatee (*z*) : although we have seen (*a*) that if an executor appoint an executor, the goods will pass to him as the representative of the first testator ; while, on the other hand, an administrator cannot transmit any interest in the property of the intestate to his own personal representative.

but an executor in his lifetime may alien the assets, and they cannot be followed by the creditors of the deceased.

But, generally speaking, an executor or administrator, in his own lifetime, may dispose of and alien the assets of the testator : he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased (*b*). This rule, however, is subject to some qualifications, which will be pointed out when this Treatise arrives at the general discussion of the power of executors and administrators (*c*).

Grant of *omnia bona sua* by an executor :

With reference to the possession in *auter droit*, it has been held, that if an executor or administrator grant *omnia bona sua*, the goods of the deceased will not pass, unless the grantor have no goods but as executor or administrator (*d*). So if an executor releases all actions, suits and demands

release of all demands.

(*y*) 3 Preston on Convey. 311.

(*z*) Bransby v. Grantham, 2 Plowd. 525. Godolph. Pt. 2, c. 17, s. 3.

(*a*) Ante, p. 204.

(*b*) By Lord Mansfield, in Whale v. Booth, 4 T. R. 625, note to Farr v. Newman.

(*c*) See post, Pt. III. Bk. I. Ch. I.

(*d*) Hutchinson v. Savage, Lord Raym. 1307. Wentw. Of Ex. 193, 14th edit. But an executor may have trespass for taking goods in his time, *quare bona catalla sua*, because of the possession : by Holt, C.J., in Knight v. Cole, 1 Show. 155.

whatsoever, which he had for any cause whatever, this extends only to such as he has in his own right, and not to such as he hath as executor (e).

Since the passing of the Married Women's Property Act, 1882, a married woman can act as executrix or administratrix as if she were a *feme sole* without the control of her husband: the husband, therefore, of an executrix or administratrix has since that Act, no power of disposition over the personal estate so vested in his wife (f).

Since the Married Women's Property Act, 1882, no control of husband over his wife, if executrix or administratrix.

With respect to the Poor Laws, it may be here observed, that an executor or administrator will gain a settlement by estate by a residence as such upon a leasehold property of the deceased (g). And a settlement will equally be gained, although the tenement to which he comes as executor or administrator be under the value of 10*l.* a year (h). So it was held, that the husband of an administratrix, entitled to the trust only of a term, gained a settlement by residence thereon for forty days (i). And the executor to a tenant of an estate under 10*l.* a year gains a settlement by forty days' residence, although he does not prove the Will; because the property vests in him from the death of the testator (k): but a next of kin of a lessee for years, in a case where several are in equal degree of kindred, can gain no settlement by residing on the land, if he does not take out letters of administration; because no right is vested in him till that is done (l). Yet in the case of a *sole* next of kin, exclusively entitled to the administration of the personal

When an executor, &c., will gain a settlement by residing on the leasehold of the testator, &c.

(e) Knight v. Cole, 1 Show. 153.

(f) See ante, pp. 185, 186.

(g) Rex v. Sundrish, Burr. Sess. Ca. 7.

(h) Rex v. Uttoxeter, Burr. Sess. Ca. 538. Even though the letters be taken out for a pauper administrator by pariah officers, on

purpose to create the settlement: Rex v. Great Glens, 5 B. & Adol. 188.

(i) Mursley v. Grandborough, 1 Stra. 97.

(k) Rex v. Stone, 6 T. R. 295.

(l) Rex v. Barnard Castle, 2 A. & E. 108.

estate, who had resided more than forty days in the parish in which a leasehold tenement belonging to the intestate lay, it was held, that she thereby gained a settlement, although she had not then obtained a grant of the administration; upon the ground that the exclusive right to enforce the proper means of acquiring the legal title to the property, coupled with the actual enjoyment of it, gave so much colour of right to reside, as to exempt such residence from being considered a vagrant intrusion into a parish in which the party has nothing of *his own*, within the purview and scope of the Poor Laws (*m*).

3 & 4 W. IV. c. 74. Executor not to be protector.

By stat. 3 & 4 Wm. IV. c. 74 (*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance*), s. 27, it is provided and enacted, "that no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement."

How the effects which an executor takes as such may become his own.

It may be proper to conclude these doctrines as to the difference between the interest which an executor or administrator has in the goods of the deceased, and such as a man has in his own proper goods, by considering more fully a subject to which there has already been occasion to advert (*n*), viz., how the property which the executor or administrator has at first in his representative character, may become his own to his own use, as his other goods which he has not as executor or administrator (*o*).

As first, in regard to the ready money left by the testator on its coming into the hands of the executor, the property

(*m*) *Rex v. Horsley*, 8 East, 405. A grant of administration will not operate by relation so as to vest a term in the administrator from the death of the intestate, and thus make a person irremovable for a time past, who during that time

was removeable: *Ibid.* 409; and see also *Rex v. Widworthy*, Burr. Sess. Ca. 109.

(*n*) *Ante*, p. 563.

(*o*) *Wentw. Off. Ex. c. 7*, p. 157, 14th edition.

in the specific coin must of necessity be altered : for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value ; and therefore a creditor of the testator cannot, by *fiery facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution (p).

So if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation ; and if it be not more than adequate, the chattel by such election shall become his own (q) : Consequently, if by such election he acquire the absolute ownership of the chattel, and die, his executor may defend himself in an action of *detinue* brought for the same by the surviving executor of the first testator (r). Hence, if an executor pays with his own money the debts of the testator in such order as the law appoints, to the value of the whole of the personal assets, he acquires an absolute right to them ; and he may dispose of them as he pleases, without being guilty of any *devastavit* (s).

(p) Wentw. Off. Ex. c. 7, p. 196, 14th edition. Toller, 238. It would seem, however, that a creditor of the testator would be entitled, now that the Judicature Act has provided that where there is a difference between the principles of Law and Equity those of Equity are to prevail, to have the judgment debt satisfied out of such intermixed moneys to the amount of the testator's money : *Re Hallett*, 13 C. D. 696.

(q) Wentw. Off. Ex. c. 7, pp. 196, 199, 14th edition. *Elliott v. Kemp*, 7 M. & W. 313, *per Parke, B.*

(r) Toller, 239.

(s) *Merchant v. Driver*, 1 Saund. 307. *Chalmer v. Bradley*, 1 Jac. & Walk. 64. *Vanquelin v. Bouard*, 15 C. B., N. S. 341, 372. However, in *Hearn v. Wells*, 1 Coll. 333, *Knight Bruce, V.-C.*, said he could not accede to the proposition that an executor has a right in equity to acquire as a purchaser an absolute title to specific chattels by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels : Whatever might be the rule of law upon a plea of *plene administravit*, he apprehended that not to be the rule in equity : His Honour did not agree that in

So, if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of the property in favour of the executor, by the mere act and operation of law: in the former case, his election, and in the latter the mere operation of law, shall be equivalent to a judgment and execution; for he is incapable of suing himself (*t*).

So, in the case of a lease of the testator, devolved on the executor, such profits only as exceed the yearly value shall be held to be assets: it therefore follows, that, if the executor pay the rent out of his own purse, the profits to the same amount shall be his (*u*).

There are likewise other means of thus changing the property: as if the testator's goods be sold under a *fiery facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he does so, the property which was vested in him as executor shall be turned into a property in *jure proprio* (*x*).

Again, if the executor among the testator's goods find and take some which were not his, and the owner recover damages for them in an action of trespass or trover, and the judgment is followed by satisfaction, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them (*y*).

If an executor or administrator makes an underlease of a term of years of the deceased, rendering rent to himself, his executors, &c., though he has the term wholly in right of the intestate, yet, when he makes this lease, he has power to dispose of the whole; and by making a lease of part, he appropriates that to himself, and divides it from the rest, and has equity, the executor had, under such circumstances, an absolute right to the property. It may be that, since the Judicature Act, the rule in Equity will prevail, and the rule in law, established by the above cited cases, cease to be in force.

(*t*) Plowd. 185. Toller, 239.

(*u*) Went. Off. Ex. c. 7, p. 200, 14th edition. Toller, 239.

(*x*) *Ibid.*

(*y*) Went. Off. Ex. c. 7, p. 200, 14th edition. Toller, 239. *Brinsmead v. Harrison*, L. R., 6 C. P. 584.

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Toller, 239. Brin-
son, L. R., 6 C. P.

the rent in his own right: and if he dies, the rent will be payable to his personal representative, and not to the administrator *de bonis non* of the original deceased (z).

As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee (a), so an administrator, who is also entitled to share in the residue as one of the next of kin under the Statute of Distribution, may acquire a legal title, in his own right, to goods of the deceased, either by taking them by an agreement with the parties entitled to share with himself under the statute, or even without such agreement, by appropriating them to himself as his own share (b).

If one of several executors or administrators alone sell any of the goods of the testator, he alone may maintain an action for the price, not naming himself executor (c).

In a case where bills of exchange had been accepted by A., for the accommodation of B., one of the executors of C., it appeared that B., having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in his possession, discounted the bills with such money, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box: And it was held, by Alexander, C.B., that B. could not sever his character of an accommodation holder of these bills from his character of executor, so as to enable him and his co-executor to sue as indorsees of the bills for a valuable consideration (d).

(z) *Drue v. Baylie*, 1 Freem. 403. But see *Cowell v. Watts*, 6 East, 405. *Catherwood v. Chaland*, 1 B. & C. 150: *infra*, Pt. II. Bk. III. Ch. II.; Bk. IV. Ch. II.

(a) See *post*, Pt. III. Bk. III. Ch. IV. § III.

(b) *Elliott v. Kemp*, 7 M. & W.

313, *per Parke, B.* See, however, *ante*, note (e).

(c) *Godolph. Pt. 2, c. 16, s. 1.* *Wentw. Off. Ex. 224*, 14th edit. *Brassington v. Ault*, 2 Bing. 177. *S. C.* 9 Moo. 340.

(d) — *v. Adams*, 1 Younge, 117.

BOOK THE SECOND.

ON THE QUANTITY OF THE ESTATE IN POSSESSION OF AN
EXECUTOR OR ADMINISTRATOR.

The estate of
an adminis-
trator is the
same as that
of an executor.

AFTER the administration is granted, the interest of the administrator in the property of the deceased is equal to and with the interest of an executor (*a*). Executors and administrators differ in little else than in the manner of their constitution (*b*).

The whole per-
sonal estate of
the deceased
vests in the
executor :

The general rule is, that all goods and chattels, real and personal, go to the executor or administrator (*c*). By the laws of this realm, says Swinburne (*d*), as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, tenements, and hereditaments. In other words it may be stated, that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator.

Personal prop-
erty of which
the deceased
was joint
tenant shall
not go to the
executor :

The personal property in which the deceased had but a joint estate or possession will survive to his companions, and his executor or administrator will not be entitled to a moiety of it (*e*) : for a survivorship holds place regularly as well between joint tenants of goods and chattels in possession or in right, as between joint tenants of inheritance or freehold (*f*). But the ware, merchandise, debts, or duties,

(*a*) Touchs. 474. Blackborough v. Davis, 1 P. Wms. 43, by Holt, C.J.

(*b*) Treat. Eq. Bk. 4, Pt. 2, c. 1, s. 1.

(*c*) Com. Dig. Biens (C). Co. Lit. 388, a. The *heres* of the civil law, answering to our executor or administrator, succeeded in *universum jus defuncti* : Godolph. Pt. 2,

c 1, s. 1.

(*d*) Swinb. Pt. 6, s. 3, pl. 5.

(*e*) Swinb. Pt. 3, s. 6, pl. 1. See *post*, Pt. III. Bk. III. Ch. v. § 1, as to what constitutes a joint tenancy in personal property.

(*f*) Co. Lit. 182, a. Harris v. Ferguson, 16 Sim. 308. *Crossfield v. Such*, 8 Exch. 825.

which joint merchants have, as joint merchants or partners, shall not survive, but shall go to the executors of the deceased; and this is *per legem mercatoriam* which is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (g). And this part of the *lex mercatoria* has been extended to all traders (including manufacturers) (h), and as it should seem, to all persons engaged in joint undertakings in the nature of trade (i). Thus, if two take a lease of a farm jointly, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive (j). So where two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies; when the money is paid the survivor shall not have the whole, but the representative of him who is dead shall have his proportion (k). So if two or more make a joint purchase of land, and afterwards one of them lays out

except in the cases of partners in trade, &c.

(g) *Ibid.* Rex v. Collectors of Customs, 2 M. & S. 225. But with respect to *choses in action* though the right of the deceased joint tenant devolves on his personal representative, the *remedy* survives to his companion, who alone must enforce the right by action: See post, Pt. II. Bk. III. Ch. I. § II.; Pt. v. Bk. I. Ch. I. And it has been doubted whether the rule can in any case be enforced but in a Court of Equity. See Smith's Mercantile Law, 149, 3rd edition. Abbott on Shipping, 97, 7th edit. But it was decided by the Court of Exchequer, after full consideration, that the title to partnership chattels does not survive at law: Buckley v. Barber, 6 Exch. 164. In the same case it was argued that the surviving partners have, at law, at all events, a *jus dis-*

ponendi as to the partnership chattels, for the purpose of winding up the partnership debts: The Court, however, doubted whether they have a power to sell and give a good *legal* title to the share belonging to the executor of the deceased partner when they sell in order to pay the debts of the partnership; and the Barons held that certainly the survivors have no power to dispose of his share otherwise than to pay such debts.

(h) Buckley v. Barber, 6 Exch. 164.

(i) Hamond v. Jethro, 2 Brownl. & Gold. 99.

(j) Jeffereys v. Small, 1 Vern. 217.

(k) Fonbl. Treat. B. 2, c. 4, s. 2, note (g). Vickers v. Cowell, 1 Beav. 529.

a considerable sum in repairs and improvements and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it (l). But where two become joint tenants, or jointly interested, in personal property, by way of gift, there the same shall be subject to all the consequences of the law of survivorship (m).

In the case of *Morris v. Barrett* (n), the residue of real and personal estates was devised by a testator to his two sons as joint tenants; and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other; it was held, under the circumstances, that they continued, till the death of one of them, joint tenants of all the property that passed by the Will of their father, but were tenants in common of the after-purchased estates.

Rights of
executor of one
of several
partners.

The general rule of law is, that on the death of one of several partners, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of, and if the surviving partners continue the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivors with interest on the amount of capital retained and used by them. If the property of the partnership consists in part of

(l) *Lake v. Gibson*, 1 Eq. Cas. Abr. 291, pl. 3. See further *Harrison v. Barton*, 1 Johns. & H. 287, where, on the purchase by two persons contributing equally to the costs of it, Wood, V.-C., held that parol evidence of surrounding circumstances and of subsequent dealings was admissible, notwithstanding the Statute of Frauds, to prove an intention to

hold in severalty: and his Honour relied on the observation of Sir W. Grant, in *Aveling v. Knipe*, 19 Ves. 441, that equity will not hold a purchase joint, if there are any circumstances from which it can be collected that a joint tenancy was not contemplated.

(m) 1 Vern. 217. *Post*, Pt. III. Bk. III. Ch. v. § 1.

(n) 3 Younge & Jerv. 384.

leasehold¹s, the executor of the deceased partner may treat the survivors as trustees, and if they renew the lease, they are considered to do so for the benefit of the partnership (o).

In some instances the title which the deceased had in respect of a special property only in goods is transmissible to his personal representative. Thus if an uncertificated bankrupt had acquired goods after his bankruptcy and died possessed of them, having been allowed to retain possession by the assignees, his executor or administrator might recover them from a stranger; for there was a good title in the bankrupt as against all the world but the assignees, and this title passed to his personal representative (p). But it should seem that the bare circumstance of the deceased having died in possession of goods will not give his executor or administrator a title to them even against a mere wrongdoer, if it can be shown that, in truth, the title is elsewhere (q).

Where a person had the option upon the death of the survivor of certain other persons, to purchase an hotel at a given price, and before the death of such survivor, he died leaving a Will and appointing executors, it was held that the option to purchase the hotel was a right personal to the testator, and could not be exercised after his death by his executors (r).

Besides the interest which an executor or administrator in all cases takes in the whole personal estate of the testator or intestate, he may in some instances be seised of real property of the deceased as trustee, or be *ex officio* invested with a power of disposing of it. The rule is that you must find out the

In what cases the title goes to the executor, where the deceased had only a special property.

An executor may be seised of real property as trustee:

rule that you must find

(o) *Clements v. Hall*, 2 De G. & J. 173, 186. *Townend v. Townend*, 1 Giff. 201. *Wedderburn v. Wedderburn*, 22 Beav. 84, 86. As to the proper mode of taking the partnership accounts of bankers, see between a surviving partner and the estate of a deceased partner, see *Bate v. Robins*, 32 Beav.

73.

(p) *Fyson v. Chambers*, 9 M. & W. 400. *Ante*, p. 556. See also *Morgan v. Knight*, 15 C. B., N. S. 669.

(q) *Elliott v. Kemp*, 7 M. & W. 306. *Ante*, p. 556.

(r) *Re Cousins*, 30 C. D. 203.

intention of
testator from
the whole
Will taken
together :

intention of the testator from the whole Will taken together, and, if it appears on the whole construction that you cannot give effect to the Will, unless you give the executors a legal estate, then you must hold that they have the legal estate. Therefore, where a testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his wife and his four daughters to be equally divided between them : provided as follows, that the share of his wife should be divided after her death between his four daughters, or the survivors and their children : and the testator appointed his wife and another executors to act jointly in carrying out all the intentions of his Will, and to invest his daughters' shares for their benefit and the benefit of their children ; it was held upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors, who could make a good title to a purchaser (s).

in what cases
executors take
the fee in trust
to sell, or
merely a
power of dispo-
sition :

It has been a subject of some discussion in what cases executors take a fee simple, in trust to sell, under a Will, or are invested merely with a power of disposition. The distinction resulting from the authorities appears to be this : that a devise of the land to *executors to sell* passes the interest in it ; but a devise that *executors shall sell the land*, or that *lands shall be sold by the executors*, gives them but a power (t). An eminent writer has concluded from an examination of all the cases, that even a devise of *land to be sold by the executors*, without giving the estate to them, will invest them with a power only, and not give them an interest (u).

(s) Davies to Jones, 24 C. D. 190. In *Anthony v. Rees*, 2 Cr. & J. 75. Bayley, B., in his judgment says, "when trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate."

(t) All the cases will be found in 1 Sugden on Powers, 128, *et seq.*,

6th edit. See also *Doe v. Shutter*, 8 A. & E. 905. *Accord.*

(u) 1 Sug. on Pow. 133, 6th edit. But see, on this subject, Co. Lit. 113, a, and Mr. Hargrave's note, where that learned person inclines to construe a devise that executors shall sell the land, as well as a devise of lands to be sold by ex-

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It sometimes happens that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, *if the proceeds be distributable by the executor*, he shall have the power by implication. Thus, a power in a Will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies (x); and it seems, that whilst the chain remains unbroken, the power, until exercised, will go from him to his executors (y).

But in *Bentham v. Wiltshire* (z), where a testator bequeathed an estate to his wife for life, and directed that

executors, as investing them with a fee simple, and not merely a power. Powell on Devises, vol. 1, pp. 245, 4 seq., 3rd edit., takes the same view of the question as Edw. Sugden. In *Knocker v. Bunbury*, 4 Bing. N. C. 306, a testator possessed of real and personal property desired his executors, out of such moneys of his as might come to their hands, to purchase two annuities for A. W. and her children: And with regard to the rest of his property, of what kind soever, he desired his executors, after payment of his debts and funeral expenses, to pay and make over the whole to his daughter, and to the children of the said daughter after her decease: The Court of Common Pleas were of opinion that the executors took no interest in the freehold property: but that they had a power to settle it upon the daughter for life, with remainder after her decease to her children and their heirs.

(x) 1 Sug. on Pow. 238, 6th edit., where all the cases are collected: See also 2 Preston on Abstracts,

264. *Curtis v. Fulbrook*, 8 Hare, 278 (correcting the report of S. C. 8 Hare, 25): And if the produce of the real estate is blended with the personal estate, the power to sell will vest in the executors by implication: *Tylden v. Hyde*, 2 Sim. & Stu. 238. See also *Forbes v. Peacock*, 11 Sim. 152. 12 Sim. 528. 11 M. & W. 630. *Gosling v. Carter*, 1 C. Ill. 644. *Robinson v. Lowater*, 17 Beav. 592. 5 De G. M. & G. 272. *Wrigley v. Sykes*, Rolls, 22 Jan. 1856, 20 Jurist, 78.

(y) 1 Sugd. on Pow. 138, 6th edit. So it may be exercised by the survivor of two or more executors: *Forbes v. Peacock*, 11 M. & W. 630. Where a testator directs that his debts shall be paid by his executors thereafter named, and in case his personal estate should be insufficient charges his real estate with the deficiency, an administrator *test. annex.* has no power to sell the real estate either under the terms of the Will or by virtue of 22 & 23 Vict. c. 35, s. 16. *Re Clay and Tetley*, 16 C. D. 3.

(z) 4 Madd. 44.

executors shall have a power to sell land by implication, where the proceeds are distributable by them:

secus, where the management of the fund is not given to them:

after her decease the estate should be sold to the highest bidder by public auction, and the money arising from such sale be disposed of among certain persons named in his Will, and he appointed his wife and another person executors; it was held, that the power was not given by implication to the executors; because they had nothing to do with the produce of the sale, nor any power of distribution with respect to it (a).

whether a mere charge of debts on land gives the executors an implied power of sale :

In this case the Vice-Chancellor (Leach) said that the power to the executors to sell is "necessarily to be implied from the produce being to pass through their hands in the execution of their office, as in the payment of debts and legacies." And accordingly before the case of *Doe v. Hughes* (b), the law had, it appears, been considered to be that the effect of a charge of the real estate with debts was to give to the executors an implied power of sale (c), but in that case the Barons of the Exchequer deliberately denied this proposition (d).

(a) See also *Patton v. Randall*, 1 Jac. & Walk. 189. 1 Sugd. on Pow. 138, 139, 6th edit. *Allum v. Fryer*, 3 Q. B. 442, 446. *Accord.* But the authority of *Bentham v. Wiltshire* was doubted by *Shadwell, V.-C.*, in *Forbes v. Peacock*, 11 Sim. 152, 12 Sim. 528; and his Honour said (12 Sim. 536), that he did not think Sir John Leach would have decided as he did in that case if he had seen the case of *Ward v. Devon*, which was decided by Sir W. Grant (11 Sim. 160). See, however, *Haydon v. Wood*, 8 Hare, 279, note (a), and *Curtis v. Fulbrook*, *Ibid.* 278 (correcting the report, *Ibid.* 25).

(b) 6 Exch. 223.

(c) See 17 Beav. 601, by Romilly, M.R.

(d) Where therefore there is a

general charge of debts, and no distinct provision as to the person by whom the sale is to be made, then the executors take an implied power to sell for the payment of debts: *Hodkinson v. Quinn*, 1 Johns. & H. 309, by Wood, V.-C. See also *Wrigley v. Sykes*, 21 Beav. 337. *Sabin v. Heape*, 27 Beav. 553. *Cook v. Dawson*, 24 Beav. 123, 126. See also S. C. on appeal, 3 De G. F. & J. 127. But see also *Ibid.* 128, by Lord Justice Knight Bruce. But an exception, it seems, prevails where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, for that in such case it is assumed that the testator meant that the debts should be paid only out of the property which passed to the executor: *Cook v. Dawson*

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With respect to all Wills which have come into operation after 13th August, 1859, the power to sell is expressly conferred on executors by Lord St. Leonards' Act [22 & 23 Vict. c. 35], where the testator has charged his real estate with the payment of his debts or legacies, and has not devised the hereditaments so charged to trustees.

Even without a charge, express or implied, executors can make a good title to leaseholds, although specifically devised, unless they have assented to the bequest: but in this case the purchaser generally requires the concurrence of the legatee (e).

Where executors in whom the legal estate is vested are selling real estates charged with debts, a purchaser is not bound or entitled to enquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease (f).

3 De G. F. & J. 127. So where the estate is devised to another charged with the payment of debts, the doctrine of implying a power in the executors does not apply; for there the money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title: *Colyer v. Finch*, 5 H. of L. 905; *Corser v. Cartwright*, L. R., 7 H. L. 731. *West of England Bank v. Murch*, 13 C. D. 138. So where a testator after a charge of debts devised real estates to trustees upon trusts for his daughters and their families and after the death of the surviving daughter upon trust to sell, with power to give receipts, and to apply the proceeds after satisfying all incumbrances affecting the said real estates upon certain trusts; *Wood, V. C.*, held, on demurrer, that the trustees could make a

good title without the concurrence of the executors, though the learned Judge appears to have conceded that the executors would have had the power to sell previously if they had chosen to do so: *Hodkinson v. Quinn*, 1 Johns. & H. 303. The powers, however, conferred on executors by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 16) do not apply to cases in which the executor has renounced and an administrator *test. annex.* has been appointed. The administrator who is not appointed by the testator but is the officer of the Court, has no power to sell the real estate either under the terms of the Will or under the above Act: *Re Clay and Tetley*, 16 C. D. 3.

(e) *Dart's Vendors and Purchasers*, 5th edit. 598.

(f) *Re Tanqueray Willaume and Landau*, 20 C. D. 463. The executor who is also devisee of an estate charged with the payment

Charge of debts or legacies on real estate not devised to trustees gives executors power of sale. 22 & 23 Vict. c. 35, ss. 14, 16.

And there is no distinction whatever between a devise of estates to executors subject to a charge of debts, with the implied power of sale which follows from it, and a trust for payment of debts where the legal estate is expressly devised to trustees for the purpose of making such payment. In neither case, where the death is recent, has a purchaser any obligation to enquire whether the debts are paid or not, and if he does not enquire, and has no notice that the debts are paid, he is quite safe.

As to what words are sufficient to indicate an intention, that real estate devised to executors shall be held charged with the debts of the testator, by reason of a direction that the executors shall pay the testator's debts, it has been held that if there is a direction that the executors shall pay the testator's debts, followed by a gift of all his estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest as in *Henvell v. Whitaker* (g), or only a life interest as in *Finch v. Hattersley* (h), or no beneficial interest at all as in *Hartland v. Murrell* (i). But this rule seems only to apply, where the entirety of the liability has been thrown on the entirety of the estate (gg). Generally the intention must be collected

of debts may be presumed by a *bond fide* purchaser or mortgagee of that estate to be dealing with it for the purposes of the administration and may give a valid title to it. Such purchaser or mortgagee therefore will not be bound to look to the application of the money. Mere absence of statement of the purpose for which the money obtained by the sale is to be used will not make the purchaser or mortgagee liable on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts. *Corser v.*

Cartwright, L. R. 7 H. of L. 731. The rule intimated in *Re Tanqueray Willaume and Landau* (*ubi sup.*) that where an executor is selling real estate after twenty years have elapsed from the testator's death, a presumption arises that the debts have been paid and the purchaser is therefore put upon enquiry does not in general apply to the case of an executor selling leaseholds of his testator. *Re Whistler*, 35 C. D. 561.

(g) 3 Russ. 343.

(h) 3 Russ. 345n.

(i) 27 Beav. 204.

(gg) *Bailey v. Bailey*, 12 C. D. 268.

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from the whole Will (*hh*), and it has been said that there is
an exception from the general rule, where there are two or
more executors to whom unequal benefits are given by the
Will (*ii*).

It is here necessary to observe, that a testator cannot alter
the legal character of real property by directing, either im-
pliedly or expressly, that it shall be considered part of his
personal estate. Accordingly, it may now be considered a
settled rule, that where lands are devised to executors, to be
sold for the payment of debts and legacies, the money arising
from the sale is to be considered equitable and not legal
assets (*k*). The distinction between these two kinds of assets,
and the consequences of that distinction, will be considered
hereafter, with the subject of assets generally.

It is, however, an established doctrine in Courts of Equity,
that things shall be considered as actually done, which ought
to have been done : and it is with reference to this principle,
that land is under some circumstances regarded as money,
and money as land. It was laid down by Sir Thomas Sewell,
M. R., in *Fletcher v. Ashburner* (*l*), "that nothing was
better established than this principle, that money directed to
be employed in the purchase of land, and land directed to be
sold and turned into money, are to be considered as that
species of property into which they are directed to be con-
verted ; and this in whatever manner the direction is given ;
whether by Will, by way of contract, marriage articles, settle-
ment or otherwise, and whether the money is actually de-
posited or only covenanted to be paid, whether the land is
actually conveyed or only agreed to be conveyed. The owner
of the fund, or the contracting parties, may make land money,
or money land " (*m*). It follows, therefore, that every person

A testator
cannot turn
his real estate
into legal
personal assets
by directing it
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Doctrine of
equitable
conversion :

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sidered as
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(*hh*) *Wasse v. Heslington*, 3 My.
& K. 493.

(*ii*) *Harris v. Watkins*, Kay,

438.

(*k*) *Clay v. Willis*, 1 B. & C. 364.

Barker v. May, 9 B. & C. 489.

See *Attorney-General v. Brunning*,
8 H. of L. 243, *ante*, p. 547.

(*l*) 1 Bro. C. C. 497.

(*m*) See *Weldale v. Partridge*, 5
Ves. 396, where Lord Alvanley
remarks the accuracy of this

claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to that species of property (*n*).

statement of the doctrine. This doctrine does not extend to the interpretation of statutes imposing duties on personal estate: *Re De Lancey*, L. R., 4 Exch. 345, *per* Kelly, C. B.

(*n*) 2 Powell Dev. 61, Jarman's edition. See also Sugden's Law of Property, 460, and the cases as to Legacy Duty collected *post*, Pt. III. Bk. v. Ch. II. Where by a marriage settlement freehold property has had imposed upon it by reason of the doctrine of equitable conversion the character of personality, a Will made under a power contained in the settlement disposing of it is entitled to probate and the property is liable to probate and legacy duty: In the goods of Gunn, 9 P. D. 242. An absolute order for sale, made within the jurisdiction of the Court in an administration action, operates as a conversion from the date of the order and before any sale takes place: *Hyett v. Mekin*, 25 C. D. 735. There is no equity for the Crown to call for a conversion of real property in order that it may take the produce of it: *Taylor v. Haygarth*, 14 Sim. 8. *Henchman v. Att.-Gen.*, 3 M. & K. 485. It should be further observed that though a new character may, by this doctrine of equitable conversion, have been impressed upon the property, yet it is in the power of any person (not personally incompetent) who is entitled to it

absolutely, to elect to take it in its actual state: *Mutlow v. Bigg*, 1 C. D. 385. *Re Gordon*, 6 C. D. 531. *Meek v. Devenish*, *Ibid.* 566. *Re Davidson*, 11 C. D. 341. But those electing must be absolutely entitled; if they have only a defeasible interest in the proceeds of the sale they cannot effect a conversion: *Sisson v. Giles*, 32 L. J. Ch. 606. Slight circumstances, and even parol declarations of such an intention, will be sufficient for this election: (See 1 Roper on Leg. 473, 3rd edit. *Matson v. Swift*, 8 Beav. 375, *per* Lord Langdale, M. R. :) but they must be unequivocal. Changing the security of the money to be laid out in land will effectuate the purpose: *Lingen v. Sowray*, 1 P. Wms. 172; or bequeathing it as personality: *Triquet v. Thornton*, 13 Ves. 345; or making a lease of the estate directed to be sold: *Crabtree v. Bramble*, 3 Atk. 680. Preserving the property in its actual state may be sufficient: *Dixon v. Gayfere*, 17 Beav. 433. *Mutlow v. Bigg*, 1 C. D. 385. *Re Gordon*, 6 C. D. 531. But the mere circumstance of the funds remaining unconverted in the hands of the person entitled to it at all events is not, unaccompanied by length of time, evidence of his intention to alter its new character: *Kirkman v. Miles*, 13 Ves. 338. Nor is continued receipt of rent by the testator's widow of property, let

Again, since equity looks upon things agreed to be done, ^{land con-} as actually performed, it follows, that, when a real estate ^{tracted to be} is contracted to be sold, the vendor is regarded in equity ^{sold :} as a trustee for the purchaser of the estate sold (*o*), and the purchaser as a trustee of the purchase-money for the vendor (*p*). Hence, the death of the vendor or vendee before the conveyance (*q*), or surrender (*r*), or even before the time agreed upon for completing the contract, is in equity immaterial (*s*). If the vendor die before the payment of the purchase-money, it will go to his executors and form part of his assets (*t*): and even if a vendor reserve the purchase-money payable as he shall appoint by an instrument executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets (*u*). So if the contract be valid at the death of the vendor, but the purchaser loses his right to a specific performance by subsequent laches, the estate belongs to the

for a term of years by a testator by lease running for twenty years after his death, evidence of an election by the widow, who died during the term, to take such property as real estate, if the tenant has by the lease an option to purchase the reversion at any time during the term: *Re Lewis*, 30 C. D. 654.

(*o*) *Atherley v. Vernon*, 10 Mod. 518. *Davie v. Beardsham*, 1 Chan. Cas. 39. *Sugden's Vendors, &c.*, Ch. 4, s. 1.

(*p*) *Green v. Smith*, 1 Atk. 572. *Pollexfen v. Moore*, 3 Atk. 272.

(*q*) *Paul v. Wilkins*, Toth. 163.

(*r*) *Barker v. Hill*, 2 Chan. Rep. 218.

(*s*) *Sugden, ubi supra*. In the case of *Hudson v. Cook*, L. R., 13 Eq. 417, where an intestate was at the time of his death under a contract to purchase realty which the vendor might have specifically

enforced, but which he afterwards rescinded under a power thereby reserved to him, it was held that the heir-at-law of the intestate was entitled to receive the purchase money out of the intestate's personal estate.

The rents which accrue between the vendor's death and the time for completing the contract belong to the vendor's heir and not to his executor: *Lumsden v. Fraser*, 12 Sim. 263. See also *Shadforth v. Temple*, 10 Sim. 184.

(*t*) *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28. *Baden v. Earl of Pembroke*, 2 Vern. 213. *Bubb's case*, 2 Freem. 38. *Smith v. Hilbert*, 2 Dick. 712. *Foley v. Percival*, 4 Bro. C. C. 429. *Sugden, ubi supra*. *Eaton v. Sanxter*, 6 Sim. 517.

(*u*) *Thompson v. Towne*, 2 Vern. 319. *Sugden, ubi supra*.

next of kin and not to the heir-at-law (*x*). Again, if a man devises his real estate and afterwards sells it, and the purchase is not completed until after his death, the purchase-money belongs to his personal representatives, notwithstanding the stat. 1 Vict. 26, s. 23, and not to his devisee (*y*). So where after making a Will devising a specific estate and bequeathing the personal residue to other persons, a testator entered into a contract, giving an option of purchase over part of the estate, which option was exercised after the death; it was held by Wood, V.-C., that the property was converted, from the date of the exercise of the option, and went to the residuary legatee (*z*).

money covenanted to be laid out in and:

On the same principle, money covenanted to be laid out in land, will descend to the heir (*a*). Nor will it make any difference that the covenant is a voluntary one: Therefore, if a man, without any consideration, covenant to lay out money in a purchase of land to be settled on him and his heirs, a Court of Equity will compel the execution of such contract, though merely voluntary. But where a person covenants to lay out money in land, and afterwards himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for the money, centre in the same

(*x*) *Curre v. Bowyer*, 5 Beav. 6, note (*b*).

(*y*) *Farrer v. Winterton*, 5 Beav. 1. See also *Moor v. Raisbeck*, 12 Sim. 123. The law is the same where the sale was by contract under the compulsory powers of a Railway Company: *Re Manchester and Southport Railway*, 19 Beav. 365. See also *Richards v. Attorney-General of Jamaica*, 6 Moo. P. C. 381. On the general question whether the proceeds of compulsory sales, under Acts of Parliament, are to be considered real or personal estate, see *Re Horner*, 5 De G. & Sm. 483. *Re Taylor*, 9 Hare, 506. *Re Stewart*

1 Smale & G. 32; *Frewen v. Frewen*, L. R. 10 Ch. 619, and the cases cited *post*, p. 590.

(*z*) *Weeding v. Weeding*, 1 Jol. & H. 424.

(*a*) *Edwards v. Countess of Warwick*, 2 P. Wms. 171. The proceeds of realty sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which letters of administration can be granted, such property being realty converted into personalty to be again changed into realty: In the goods of *Lloyd*, 9 P. D. 65.

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person, the money, it should seem, is considered as discharged;
as where a man, on his marriage, covenants to lay out a sum
of money in the purchase of lands to be settled for the use
of himself for life, remainder to his intended wife for life,
remainder to the first and other sons of the marriage in tail,
remainder to the daughters in tail, remainder to his own
right heirs, and the husband does not lay out the money,
and survives his wife, who dies without issue; it has been
held that the money, though once bound by the articles,
became free again by the death of the wife without issue,
and the consequent failure of the objects of the several
limitations, and was, therefore, at the death of the settlor,
his personal estate (b).

So a testator has the power, by his Will, to change the
nature of his real estate, to all intents and purposes, so as
to preclude all questions between his real and personal
representatives after his death (c): This has been some-
times described as "a conversion out and out" (d): And
when it clearly appears to have been his intention thus to
impress on it the character of personal estate to all intents
and purposes, the mere appointment of an executor will be
sufficient to carry that property to him (e), either for his own
benefit, in cases where he is beneficially entitled to the
personal estate; or as a trustee for the next of kin, in cases
where he holds the personal estate on the like trust (f). But
this doctrine has been qualified by modern decisions; and
it is now fully established, that in order to exclude the heir,
it is not enough that the testator shows an intention that

conversion
"out and out"
by Will:

(b) *Chichester v. Bickerstaff*, 2
Vern. 295. This decision was
questioned by Lord Talbot in
Lechmere v. Lechmere, Cas. temp.
Talbot, 90, and by Sir J. Jekyll in
Lechmere v. Earl of Carlisle, 3 P.
Wms. 221; but confirmed by Lord
Thurlow, in *Pulteney v. Lord Dar-*
lington, 1 Bro. C. C. 238, and the
determination of the House of
Lords in the same case, 7 Bro. P.

C. 530. Toml. edit. See 2 Powell,
Dev. 73, Jarman's edition.

(c) *Johnson v. Woods*, 2 Beav.
409, 413, by Lord Langdale.

(d) As to this expression, see 10
Beav. 175; 12 Beav. 508.

(e) By Sir Wm. Grant, in *Berry*
v. Usher, 11 Ves. 91.

(f) See *infra*, Pt. III. Bk. III.
Ch. v. § 11., and 1 Rep. Leg. 455,
3rd edition.

his real estate should become money *after* his death; it must also be apparent that he meant it to be treated as if it had been personal estate *before* his death: For if the property in question was real estate at his death: the *onus* is on the next of kin to show a devise of it in his favour: And though the Will may determine in what quality the property shall be taken by those on whom it may devolve, yet if it does not also determine who are the persons to take, the original right of the heir at law must prevail (*g*). Therefore, the testator's declaration, however explicit, that the estate shall be absolutely converted, *e. g.*, a direction that it shall be sold and deemed part of his personal estate, will not exclude the heir; because such a direction does not, generally speaking, amount to a gift by implication to the next of kin (*h*): And the law is the same, even where the direction is accompanied by a declaration, that the proceeds of the land to be converted shall not, nor shall any part thereof, in any event lapse or result for the benefit of the heir (*i*), or where the direction itself is, that the proceeds shall be considered, "to all intents and purposes," as part of the personal estate (*k*): except, perhaps, where there is no further disposition; in which case it might be inferred that such a direction was intended to operate as a gift to the next of kin (*l*).

conversion for
particular
purposes
which fail:

It is plain, therefore, that where the conversion of land into money is directed by the testator for a particular purpose, which fails, (as in the case of the death of a party intended to be benefited,) so much of the estate, or of its

(*g*) *Fitch v. Weber*, 6 Hare, 145, 149. A different view must be taken where the question arises on a deed which has altered the character of the property before the death of the author of the deed: *Griffith v. Ricketts*, 7 Hare, 299. *Biggs v. Andrews*, 5 Sim. 424.

(*h*) *Johnson v. Woods*, 2 Beav. 409. *Flint v. Warren*, 16 Sim.

124. *Fitch v. Weber*, 6 Hare, 145. *Bromley v. Wright*, 7 Hare, 334. *Shallcross v. Wright*, 12 Beav. 505. *Taylor v. Taylor*, 3 De G. M. & G. 190 (overruling *Phillips v. Phillips*, 1 M. & K. 649).

(*i*) *Fitch v. Weber*, 6 Hare, 145.

(*k*) *Robinson v. Governors of the London Hospital*, 10 Hare, 19.

(*l*) *Ibid.* 27.

his death; it must be created as if it had been created before, or if the property had been devised to the *onus* is on the devisee: And though the property shall be devised, yet if it does not take, the original devisee takes. Therefore, the property at the estate shall be devised, that it shall be devised, will not exclude the devisee, generally, but as to the next of kin, where the direction is that the proceeds of the property part thereof, in the share of the heir (*i*), or the proceeds shall be converted into the personal estate, no further disposition is made, but that such a share shall go to the next of kin.

conversion of land into a personal estate for a particular purpose, as the death of a party, or of his estate, or of his

Weber, 6 Hare, 145. Wright, 7 Hare, 334. Wright, 12 Beav. 505. Or, 3 De G. M. & G. Phillips v. Phillips, 649.

Weber, 6 Hare, 145. In v. Governors of Hospital, 10 Hare, 19.

produce, as remains undisposed of, will result to the heir (*m*). If, on the other hand, there is a conversion of personal estate into real estate, and there is an ultimate limitation which fails to take effect, the interest which fails results for the benefit of the persons entitled to the personal estate, *i.e.*, the persons who take under the Statute of Distributions as next of kin (*n*). And it is further established, that where a testator directs his real estate to be sold, and the mixed fund arising from the produce of the real estate and the personal estate to be applied to certain specified purposes; if any part of the disposition fails, either by lapse or otherwise, then to the proportional extent in which the real estate would have contributed to that disposition, it is to be considered as failing for the benefit of the heir-at-law, and as so much real estate in that event undisposed of (*o*). A different point arises,

mixed fund from produce of sale of real estate and personal estate.

(*m*) *Ex parte Pring*, 4 Y. & Coll. Ecch. 507.

(*n*) *Hereford v. Ravenhill*, 1 Beav. 481; 5 Beav. 51. *Cogan v. Stephens*, 5 L. J. Ch. 17. If the heir at law becomes entitled to an undisposed-of interest in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives, and consequently his executor takes it as part of his personal estate. On the other hand, if the next of kin having become entitled to freehold estate dies, there is no equity to change the freehold estate into anything else on his death. It will go to the devisee of the real estate or to his heir at law if he has not devised it, and will pass as real estate. The principle is that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. See *Curtis v.*

Wormald, 10 C. D. 172, overruling *Reynolds v. Godlee*, Johns. 582. A decree for the sale of real estate having been made in a partition suit, the property was sold, and the proceeds of the sale were paid into Court. Three of the persons entitled to shares in the property died intestate before the money was distributed, leaving their father their heir at law and sole next of kin. He took out administration to each of them, and then died intestate, and it was held that the father took his children's shares of the money as their heir at law, but that he took them as money, and that on his death they passed to his personal representative and not to his heir at law. *Mordaunt v. Benwell*, 19 C. D. 532.

(*o*) *Ackroyd v. Smithson*, 1 Bro. C. C. 503. *Johnson v. Woods*, 2 Beav. 409. *Hopkinson v. Ellis*, 10 Beav. 169. *Taylor v. Taylor*, 3 De G. M. & G. 190. *Cooke v. Dealey*, 22 Beav. 196. *Edwards v. Tuck*

where there is a general residuary bequest of personal estate, in the same Will in which there is a direction for the conversion of the real estate. In such a case it should seem, that if there is a declaration in the Will that the money to arise from the sale shall be deemed part of the testator's personal estate, the undisposed of residue of the proceeds will pass under the gift of the residue, but not, generally speaking, without such a declaration (*p*). As to specific sums given out of the proceeds, it has been a subject of controversy, whether the circumstance of the produce of the real estate being blended by the testator with the general personal estate in one residuary gift, constitutes a ground for excluding the heir from lapsed or void legacies by applying to the mixed fund the rule applicable to personalty (*viz.*, that the residuary legatee takes what is not effectually disposed to other persons) (*q*). A very eminent writer (*r*) has expressed his opinion that it is difficult to discover any solid reason why the blending of the two funds should produce this consequence: But he further observes that the state of the authorities is not such as to justify the hope of all litigation being at an end on this perplexing subject.

Whether the property so resulting to the heir shall be considered as land or money in his hands, is a question of some nicety. The principle seems to be, that where the purpose of the testator still requires a sale of the whole land, and there is only a partial disposition of the produce, the surplus belongs to the heir as money and not land, and will go to his personal representative; but where no purpose of the deviser demands, in the events that have happened, that

23 Beav. 268. *Bective v. Hodgson*, 10 H. of L. 656.

(*p*) See 1 Jarman on Wills, 531, *et seq.*, 2nd edit. See page 643, 4th edition.

(*q*) The principal modern cases on the subject are *Amphlett v. Parke*, 2 Russ. & M. 221. *Green v. Jackson*, *ibid.* 238. See also

Court v. Buckland, 1 C. D. 605. *Salt v. Chattaway*, 3 Beav. 576. As to Wills made or republished since the Wills Act, 1 Vict. c. 26, see sect. 25 of that statute. *Ante*, Preface.

(*r*) Jarman on Wills, vol. i. pp. 636-644, 4th edition.

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th edition.

the whole land shall be converted into money, there the heir shall take the resulting property as land, and it shall descend as such to his heir. Thus where a deviser directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and if A. dies in the lifetime of the deviser, and the heir stands in his place, the purpose of the testator still applies to the case; therefore the heir will take the share of A. as money and not as land: But if A. and B. both die in the lifetime of the testator, and the whole interest in the land descends to the heir, the purpose of the testator, that there shall be a sale for the convenience of division, has no application, and the heir will, therefore, take the whole interest as land (s). So where a

(g) *Smith v. Claxton*, 4 Madd. 422, 493. *Davenport v. Coltman*, 11 Sim. 610, 613. See also on this subject, *Hewit v. Wright*, 1 Sim. C. C. 86. *Wright v. Wright*, 19 Ves. 188. *Dixon v. Dawson*, 2 Sim. & Stu. 340. *Jessopp v. Watkinson*, 1 Myln. & K. 665. *Hatfield v. Pryme*, 2 Coll. 204. *Burley v. Evelyn*, 16 Sim. 290. *In re Cooper's Trusts*, 4 De G. M. & G. 757. *Wall v. Colshead*, 2 De G. M. & J. 683. *Clarke v. Franklin*, 4 Kay & J. 237. *Bagster v. Fackell*, 26 Beav. 469, in which last case the testator expressly directed a conversion for the purpose of giving a life interest to his widow, and after her death there was a gift to a charity which was void, and it was held, that the heir of the testator took the produce (subject to the life estate) in the character of personalty. It should be observed that "conversion must be considered in all cases to be directed for the purposes of the Will, and is limited by the pur-

poses and exigencies of the Will. If therefore the real estate is directed to be sold with a view to a disposition made by a Will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, *i.e.* the title of the heir, although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the Will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the Will has no effect in altering the quality of the property; but the property, even in the shape of lands, retained its pristine and original quality of personal estate for the purposes of determining the ownership: "Bective v. Hodg-

testator devises his real estate in trust to be sold to pay debts and legacies, and dies intestate as to the excess, his heir will take it as land (t): In such a case also if any of the legacies lapse, they will result to the heir as land; for the purpose of the testator does not require a sale of so much of the real property (u).

Real estate
purchased with
partnership
capital.

It has been laid down that in equity all property, whether real or personal, whatever may be its nature, purchased with partnership capital for the purposes of the partnership trade continues to be partnership capital, and to have as between the real and personal representative of a deceased partner the quality of personal estate (x). Where, however, a new partner was taken into the firm, and the real property continued to be used for the partnership purposes, but a rent was paid for it, under the terms of the partnership, to the old partners by the new firm, it was held that, on the death of one of the old partners, the property was to be considered as part of his real estate (y).

Property
altered in
nature by
trustees of an
infant:

Another example of land being considered as money, and *vice versa*, may be found in the cases where guardians or trustees alter the nature of the property committed to them. Thus the lands purchased by the guardian of an infant with his personal estate will, in case of his death during his minority, be considered still as his personal property (z). So where the trustees of an infant's estate having a con-

son, 10 H. of L. 667, by Lord Westbury, C. The cases cited in the earlier part of this note appear to establish the distinction, that if all the purposes of an intended conversion of land into money fail, the conversion fails, and the heir would take such unconverted estate as land; but that if there is only a partial failure, the heir-at-law would receive the benefit of such partial failure and take the property as moneys, and not as

(t) By Sir W. Grant, in *Wright v. Wright*, 16 Ves. 191.

(u) See 1 Rep. Leg. 471, 3d edition.

(x) *Darby v. Darby*, 3 Drew 495. And see the express enactment to this effect contained in the new Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 22), and p. 548, note (u).

(y) *Rowley v. Adams*, 7 Bea 548.

(z) *Gibson v. Scudamore*, 1 Die 45.

considerable sum of money in their hands, out of the profits of his estate, laid it out in a purchase of lands lying near the estate, with the consent of his guardian, and by the conveyance to the trustees, it was declared that they stood seized in trust for the infant, in case, when he came of age, he should agree to it; the infant dying within age, the trustees were held accountable to the administrator of the infant for the sum laid out, and his heir was declared to have no title to the land (a). So where an executor in trust for an infant of a lease for ninety-nine years, determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir (b).

Again, where the committee of a lunatic invested part of his personal estate in the purchase of lands in fee, it was held that this should be taken as personal estate, and at his death should not go to his heir-at-law (c). So where the grantee of the custody of a lunatic, with the rents and profits of the estate purchased lands, the lunatic dying, the question was between the heir and administrator, who should have the benefit of the purchase; and the Court was of opinion, that the administrator should have it, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and if laying out of the money would alter the case, then it would be in the power of the grantee of the custody to prefer the heir or the administrator as he pleased (d). But it must be observed, that in the management of a lunatic's estate, it is his benefit, solely, which is considered; and, therefore, if it be clearly for his advantage, that the nature of one part of his estate should be altered for the improve-

by committee
of a lunatic:

(a) Lord Winchelsea v. Nor-
ditch, 1 Vern. 435.

(c) Awdley v. Awdley, 2 Vern.
192.

(b) Witter v. Witter, 3 P. Wms.
M.

(d) Lord Plymouth's case, 2
Freem. 114.

ment of the other, such alteration will be directed by the Court of Chancery (e); and when such alteration is made there is no equity between the real and personal representatives, at the lunatic's death, to have the nature of the property restored (f).

In the case of *Att.-Gen. v. Ailesbury* (g), where money of a lunatic was invested by his committees by order of the Lord Justices having jurisdiction in lunacy, in purchase of lands which, under their lordships' directions, were conveyed to the committees, "their heirs and assigns upon trust for" the lunatic, "his executors, administrators, and assigns," with a declaration that the land so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and re-investment which were contained in the deed) should "to all intents and purposes be considered as part of the personal estate of" the lunatic, it was held by the House of Lords, upon the death of the lunatic, who never recovered, that the value of the lands was part of the personal estate of the lunatic, and liable to probate duty.

53 Vict. c. 5.

By stat. 53 Vict. c. 5, s. 117, certain provisions are made for the sale or mortgage or other disposition of the lunatic's property for debts, maintenance, and other purposes. By sect. 123 (1) it is provided that "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act, which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of." And sub-sect. (2) provides for

(e) *Ex parte Phillips*, 19 Ves. 123.

(f) *Oxenden v. Lord Compton*, 2 Ves. Jun. 69. *Re Leeming*, 3 De G. F. & J. 43. *Re Freer*, 22

C. D. 622.

(g) 12 App. Cas. 672, reversing S. C. 16 Q. B. D. 895, and affirming S. C. 14 Q. B. D. 408.

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the real and personal representatives of the lunatic.

In *Ex parte Flamank* (h), Lord Cranworth, V. C., held that money paid into court by a Railway Company for land taken under the Lands Clauses Act (7 & 8 Vict. c. 18), from a person who was in a state of mental imbecility, and who continued in that state till his death, but was not the subject of a Commission of Lunacy, was not to be reinvested in or considered as land, but to be paid to his executors; for that the effect of the 7th section of the Act was to make the contract as good as if he had been *compos mentis*. And his Lordship distinguished the case from *The Midland Counties Railway v. Oswin* (i), where Knight Bruce, V. C., had come to a contrary decision, inasmuch as his Honor's decision turned on the express terms of the local Act on which the case before him arose (k).

In pursuing the complicated inquiry, of what shall be accounted personal estate, it may be advisable to consider the subject in the divisions employed by Godolphin and the author of the Office of an Executor, *viz.*, first to divide the effects of the deceased into things actually in his possession, and things not so, usually called *Choses in action*;—and to subdivide the first class into chattels real, and chattels personal.

Compulsory
sale of
lunatic's land
under Lands
Clauses Act.

What is per-
sonal estate.

(h) 1 Sim. N. S. 260.

(i) 1 Coll. 80.

(k) See Cramer's case, 1 Smale & G. 32, and *Re Harrop's Estate*,

3 Drew. 726, for instances where money paid into Court under certain local acts was treated as realty.

CHAPTER THE FIRST.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR
IN THE CHATELS REAL OF THE DECEASED.

SECTION I.

*The Executor's or Administrator's Right to Chattels Real,
generally.*

What are
chattels real.

THE general rule is, that chattels real shall go to the executor or administrator, and not to the heir. Chattels real are such as concern or savour of the realty (*a*); or, in other words, they are chattel interests issuing out of, or annexed to, real estates (*b*). Thus, while the military tenures subsisted, wardship in chivalry was accounted such an interest, and accrued to the executor or administrator, and not to the heir; because it was in respect of a tenure of land or other hereditament, and was for years, viz., during the minority, or till marriage had (*c*).

Next presentation to a church.

If one be seised in his natural capacity of an advowson in gross, or in fee appendant to a manor, and the church becomes void, the void turn is a chattel personal, like rent due, or any other fruit fallen; and if the patron dies before he presents, the avoidance does not go to the heir, but to the executor (*d*): And the heir in tail shall not have a presentment fallen in the life of the tenant in tail, but his

(*a*) Co. Litt. 118, *b*.

(*b*) 2 Black. Comm. 386.

(*c*) Godolphin, Pt. 2, c. 13, s. 2. Wentw. Off. Ex. 126, 14th edition. So a villain for years (as by grant for a term from him that had the

inheritance) was a chattel real: *Ibid.*

(*d*) F. N. B. 33, P. The Queen and Archbishop of Canterbury's case, 4 Leo. 109. Co. Litt. 388, *a*. Wats. C. L. 72, 4th edition.

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c. 13, s. 6
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Rennell
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(*g*) Wentw.
14th edition
(*h*) Bro
(*i*) Bro
(*k*) Wentw.
W.E.

executor (e). Again, if the patron, whether a natural or politic person, grant the next presentation of a church before avoidance, to D., in this case, if D. dies, his executor shall have it as a chattel, and not the heir (f); for it is a chattel real, till a vacancy has happened, and afterwards the vacancy turns it into a chattel personal (g). Nor will it differ the case, if the grant is to the grantee and his heirs; for where the thing is a chattel, the word "heirs" cannot make it an inheritance (h). Likewise, if a man grants the two next presentations of a church those are chattels, and if the grantee dies, the executor shall have them, and not the heir (i). So of an advowson granted to one and his heirs for 100 years (k). Again, if a church become void during the life of a husband, who is tenant by the curtesy, and he die before the church is filled, the husband's executor shall have the turn, and not the wife's heir (l).

And it is now settled that the executor has the same right, where a person seised of an advowson in a politic capacity dies during a vacancy. Thus, in a case in K. B., in error from the Common Pleas, it was held by Littleale, Holroyd, and Bayley, Justices, (Lord Tenterden, C. J., *dissentiente*), that where a prebendary, having an advowson of a rectory in right of his prebend, died while the church was vacant, his personal representative had the right of presentation for that turn; and the judgment of the Court of Common Pleas was reversed (m). This decision of the K. B. was afterwards affirmed in the House of Lords (n).

(e) F. N. B. 34. Godolph. Pt. 2, c. 13, s. 6.

(f) Godolph. Pt. 2, c. 13, s. 3: admitted by Lord Tenterden, in *Rennell v. Bishop of Lincoln*, 7 R. & C. 113, 193.

(g) Wentw. Off. Ex. 131, 132, 14th edition.

(h) Bro. Chattels, pl. 6.

(i) Bro. Chattels, pl. 20.

(k) Wentw. Off. Ex. 136, 14th

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edition.

(l) Wats. C. L. 71, 4th edit.

(m) *Rennell v. Bishop of Lincoln*, 7 B. & C. 113. In the Common Pleas, Gaselee, J., dissented from Burrough and Park, Justices, and Best, C.J.: see 3 Bingh. 223.

(n) 8 Bingh. 490. 1 Clark & F. 527.

But if the incumbent of a church be also seised in fee of the advowson of the same church and dies, his heir, and not his executor, shall present; for although the advowson does not descend to the heir till after the death of the ancestor, and by his death the church is become void, (so that the presentation in this case may be said to be severed from the advowson before it descends to the heir, and to be vested in the executor), yet both the descent to the heir and this fall of the avoidance happened all in one instant: and where two titles concur, the elder right shall be preferred (*o*). In the case of an advowson of a *donative* benefice where A. B., being seised, the church in his lifetime became void; then A. B. died, and the executors brought a *quare impedit*; after two arguments in C. B., the whole Court was clearly of opinion that the right of donation descended to the heir of A. B., and that the executor had no title, as he would have had, if it had been a presentative benefice (*p*). So if the parson of a church ought to present to a vicarage, if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage, and not the executor of the deceased parson, shall present (*q*). And in the case of a bishop, the void turn of a church, the advowson whereof belongs to him in right of his bishopric, by his death does not go to his executor, although the church was void when the bishop died, but the king shall present by reason of his custody of the temporalities (*r*).

(*o*) *Holt v. Bishop of Winchester*, 3 Lev. 47. Where a parson, who had the inheritance of the advowson, devised that his executor should present after his decease, and devised the inheritance to another in fee, it was held that this was a good devise of the next avoidance: *Pynchyn v. Harris*, Cro. Jac. 371.

(*p*) *Repington v. Tamworth School*, 2 Wills. 150. No reason is assigned, in the report of this

case, for the distinction taken, nor is it easy to suggest one. See the remarks of the Judges in *Rennell v. Bishop of Lincoln*, 7 B. & C. 113.

(*q*) 2 Roll. Abr. 346, tit. Presentment (F.), pl. 4. 1 Burn, E. L. 139, 8th edition.

(*r*) 2 Roll. Abr. Presentment, 345 (E.), pl. 4. Co. Litt. 90, a. Co. Litt. 388, a. Wats. C. L. 73, 4th edition.

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(F.), pl. 4. 1 Burn,
8th edition.
ll. Abr. Presentment,
pl. 4. Co. Litt. 90, a.
388, a. Wats. C. L. 73.

If the testator presents, and (his clerk not being admitted before his death) then his executors present their clerk, the Ordinary is at his election, which clerk he will receive (s).

Every bishop, whether created or translated, was formerly bound, immediately after confirmation, to make a legal conveyance to the archbishop of the next avoidance of one such dignity or benefice belonging to his see as the said archbishop should choose or name, which was, therefore, commonly called an *option* (t). And if the archbishop died before the avoidance happened, the right of filling up the vacancy went to his executors or administrators (u).

The options of an archbishop passed to his executors, &c.

All leases and terms of lands, tenements, and hereditaments, of a chattel quality, are chattels real, and will go to the executor or administrator (v); but he has no interest in the freehold terms or leases (x). The general rule for distinguishing these two kinds is, that all interests for a shorter period than a life, or more properly speaking, all interests for a *definite* space of time, measured by years, months or days, are deemed chattel interests; in other words, testamentary, and of the nature, for the purposes of succession, of other chattels or personal property (y). Thus not only

Estates for years :

(s) *Smallwood v. Bishop of Lichfield*, 1 Leon. 205. Wats. C. L. 72, 225, 4th edit.

(t) 1 Gibbs. Cod. 115. 1 Burn, E. L. 239, 8th edit. But it has been considered that such assignments have been rendered illegal by reason of the stat. 3 & 4 Vict. c. 113, s. 42, and that the archbishop's options have thus been destroyed: at all events they are now obsolete.

(u) *Potter v. Chapman*, Ambler. 1 Burn, E. L. 240, 8th edit.

(v) So it is with an option as an incident of a lease. Thus an option by the lessee to purchase the fee simple of the land demised

is attached to the lease and passes with it to the administrator as part of an intestate's personal estate. *Re Adams and Kensington Vestry*, 24 C. D. 199; 27 C. D. 394.

(x) Estates for years have one quality of real property, viz. immobility, but want the other, viz. a sufficient legal indeterminate duration, the utmost period for which they can last being fixed and determined: 2 Black. Comm. 386.

(y) 1 Preston on Estates, 203. On the other hand, an estate of freehold may be defined to be "an estate in possession, remainder or

an estate for one's own life, or for the life of another, is deemed a freehold; but if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se benegesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays 10*l.*, &c., or until the grantee be promoted to a benefice, or for any like *uncertain* time; in all these cases the lessee has an estate of freehold in judgment of law (2); while a lease for 10,000 years is not a freehold, but chattel interest.

Term for a certain number of years if A. B. so long live:

If an estate be limited to A. B. and his assigns during C. D.'s life, it is a freehold interest; but if it be limited to A. B. and his assigns for a certain number of years, if C. D. shall so long live, it is a chattel, and will go to his executors or administrators.

lease for life made by lessee for years:

If a lessee for years of a carve of land grants to another a rent out of the said carve for the life of the grantee, that is a good charge during the term, if the grantee so long live; but in such a case the grantee hath but a chattel (a).

lease for A.'s life, and if he die within a certain time to his executor for the rest of that term.

A. made a lease to B. for life by indenture, in which was a proviso, that if the lessee died before the end of sixty years then next ensuing, his executor should have and enjoy, as in the right and title of the lessee, for term of so many of the years as amounted to the whole number of sixty, so that the commencement of the said sixty shall be accounted from the date of the said indenture: The lessee made two executors, and died: One of them entered into the land: And the opinion of the Court was, that no lease for years was made by this proviso in the lessee, nor by remainder in his executor;

reversion, in corporeal or incorporeal hereditaments held for life or for some uncertain interest, created by Will or by some mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee or of some other person:" See Watk. on Conveyancing, by Morley

and Coote, p. 63.

(2) Co. Litt. 42, a. So where A. leases to B., till A. makes J. S. bailly of his manor; adjudged a freehold: *Ibid.* Hal. MSS. See also Beeson, App., Burton, Resp., 12 C. B. 647.

(a) Butt's case, 7 Co. 23, a. Saffery v. Elgood, 1 A. & E. 191.

the life of another, is an estate to a woman or *quandiu se bene* the coverture, or as a house, or so long as she be promoted to a man; in all these cases judgment of law (*c*); freehold, but chattel

and his assigns during but if it be limited to number of years, if C. D. will go to his executors

and grants to another of the grantee, that grantee so long live; a chattel (*a*).

term, in which was the end of sixty years have and enjoy, as in term of so many of the of sixty, so that the be accounted from the made two executors, the land: And the for years was made by under in his executor;

ce, p. 63.
Litt. 42, a. So where to B., till A. makes J. S. his manor; adjudged as: *Ibid.* Hal. MSS. See Mason, App., Burton, Resp. 647.
Att's case, 7 Co. 23, a. Elgood, 1 A. & E. 191.

because nothing of the said term was limited to the lessee for life as remainder to him and his executors (*b*).

There are certain interests in land, which although of an uncertain duration, and therefore in that respect participating of the nature of freehold, are nevertheless chattels. These are interests created by the statute law, and are securities for the payment of debts, namely, estates by statute merchant, statute staple, and by *elegit*, the possessors of which are said to hold their lands as freehold, but whose interests are really chattel, and will go to their executors and administrators (*c*).

Since an estate of freehold or inheritance cannot be derived out of a term for years, no words of limitation can alter the nature of the latter with respect to the purposes of succession. Thus if a lease for years be made to a man and his heirs, it shall not go to his heirs but his executors (*d*).

So if a lease for years be made to a bishop, parson or other sole corporation, and his successors, yet it will go to the executors of the lessee: because a term for years being a chattel, the law allows none but personal representatives to succeed thereto, nor can this mode of succession be altered by any limitation of the party (*e*).

Again, it is a principle of law, that a limitation of a personal estate to one in tail vests the whole in him. Therefore, where a term for years is devised to one and the heirs of his body, or to the heirs male of his body, the term, at the death

Restates by statute staple, statute merchant, and by *elegit*.

A lease for years made to one and his heirs shall go to the executor of the devisee:

A lease for years made to a sole corporation and his successors will go to his executors:

lease for years devised to a man in tail shall go to his executors:

(b) *Gravener v. Parker*, Anders. 19: *sed quare*; and see *ante*, p. 587.

(c) *Co. Litt.* 42, a. 2 *Saund.* 68, f. note to *Underhill v. Devereux*. *Watk. on Conveyancing*, by Morley and Coote, 63. See also *Wentw. Off. Ex.* 133, 4, 5, 14th edition.

(d) *Co. Litt.* 46, b. So if a term for years grant a rent out of

the land to A. and his heirs, the same shall go to the executor and not to the heir; for being derived out of a chattel, it must be itself a mere chattel: *Partus sequitur ventrem*: *Wentw.* 136, 14th edit.

(e) *Co. Litt.* 46, b. *Fulwood's* case, 4 *Co.* 66, a. See *Dollen v. Batt*, 4 C. B., N. S. 760, as to what reservations make a freehold, and what a chattel lease.

of the devisee, shall go to the executor and not to the heir (*f*).

So if a lease for years is given to A. and the heirs male of his body, and for default of such issue, to B. and the heirs male of his body, these words give to A. the absolute property in the whole estate and interest transmissible to his personal representatives (*g*). In a case, where the testator devised his real estates to A. for life, without impeachment, &c., with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of A. and by codicil, reciting the after-purchase of a leasehold estate, he devised the same to the trustees named in his Will, "for such estate and estates and in such manner and form" as his real estates were given by Will: It was held that A., taking an estate tail in the real estates under the Will, was nevertheless entitled to the absolute interest in the leasehold bequeathed by the codicil (*h*).

A lease for years given to A. for life, and afterwards to his heirs general or special, will go to his executors.

With respect to the limitation of real estates, where an estate for life is given to the ancestor, followed by a subsequent limitation to his heirs general or special, the subsequent limitation, as in the case just stated, vests in the ancestor, and the heir takes not by purchase. So in the limitation of leasehold estates, generally speaking, if a term for years be devised to one for life, and afterwards to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor.

Thus, in *Theebridge v. Kilburne* (*i*), where a term was limited in trust for S. for life, and immediately from and after her decease, to the heirs of the body of S. lawfully to be begotten, if the term should so long endure, and in default of such issue, then to B.: Lord Hardwicke expressed himself

(*f*) *Leonard Lovie's case*, 10 Co. 87, *b*. Wentw. Off. Ex. 136, 14th edit. 1 Prest. on Estates, 32. See *post*, Pt. III. Bk. III. Ch. II. § II. (B.)

(*g*) *Leventhorpe v. Ashbre*, 1

Roll. Abr. 611 (L.), pl. 1. *Denn v. Penny*, 1 Meriv. 20.

(*h*) *Brouncker v. Bagot*, 1 Meriv. 271.

(*i*) 2 Ves. Sen. 233.

of opinion that the whole term vested in S. Again in *Garth v. Baldwyn* (k), where real and personal estates were devised to trustees, in trust to pay the profits to G. during his life, and afterwards to pay the same to the heirs of his body, Lord Hardwicke held, that the personal estate vested absolutely in G. by this limitation. So in *Verulam v. Bathurst* (l), where a testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life for her separate use, and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of the daughter lawfully begotten, but in case her daughter should happen to die without any lawful issue living at the time of her decease, she gave the house and the stock over; it was held by Sir L. Shadwell, V. C., that the daughter took the property absolutely.

However, if there appears any other circumstance or clause in the Will, to show the intention that these words should be words of purchase, and not words of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase to the exclusion of his executor (m).

The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal hereditaments, such as leases for years of commons, tithes, fairs, markets, profits of leets, cordries for years, and the like (n).

In the case of a tenancy from year to year as long as both parties please, since the death either of the lessor or lessee does not determine it, the interest of the tenant is transmissible to his executor or administrator (o). Therefore due

Leases of
incorporeal
heredita-
ments.

Estate of
tenant from
year to year
goes to his
executor, &c.

(k) 2 Ves. Sen. 646.

(l) 13 Sim. 374.

(m) See Fearn, Cont. Rem. 490, 491, 7th edition. *Doe v. Lyde*, 1 T. R. 593. *Knight v. Ellis*, 2 Bro. C. C. 570. *Ex parte Sterne*, 1 Ves. 156, *Post*, Pt. III. Bk. III.

Ch. II. § II.

(n) Wentw. Off. Ex. 131, 14th edition. Godolph. Pt. 2, c. 13, s. 3.

(o) *Doe v. Porter*, 3 T. R. 13. *James v. Dean*, 11 Ves. 393.

notice to quit must be given to the latter before the lessor or his representative can recover in ejectment (*p*); and the executor or administrator of the lessee may maintain ejectment; and it was held no objection that the demise in the declaration was stated to be for seven years (*q*). So where W. H. being tenant from year to year to Lady H., died, leaving his widow in possession; and J. H. some time afterwards took out administration to the deceased, but the widow continued in possession, paying rent to Lady H. with the knowledge of J. H., who never objected to such payment or made any demand of rent; it was held, that there was no evidence of a determination of the tenancy from year to year by operation of law, and that the administrator was entitled to recover possession from the widow (*r*).

Leases held in joint tenancy do not pass to the executor, &c.

If a lease is made to several for a term of years, and one of the joint tenants dies, his interest accrues to the survivors, and his executors or administrators shall take none (*s*).

Terms for years vest in the executor though specifically devised :

It may be advisable here to remark, that even when a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets shall be applied, and the legatee has no right to enter without the executor's special assent (*t*).

he cannot waive a lease though it be worth nothing.

If the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it though it

(*p*) *Parker v. Constable*, 3 Wils. 25. But where a tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession, it was held by Littledale, J., that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant; and that it was not incumbent on the

landlord to show that the widow was either executrix or administratrix : *Rees v. Perrot*, 4 C. & P. 230.

(*q*) *Doe v. Porter*, 3 T. R. 13.

(*r*) *Doe v. Wood*, 14 M. & W. 682.

(*s*) Co. Lit. 182, *a*. See *ante*, p. 570, *et seq.*

(*t*) See *infra*, Pt. III. Bk. III. Ch. IV. § III.

be worth nothing; for the executorship or administratorship is entire, and must be renounced *in toto*, or not at all (*u*).

Generally speaking, the Courts of Equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interests in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest, and is transmissible to the personal representatives in the same manner as the legal estate. For a statement of the interest of an executor or administrator in estates, *pur autre vie*, by the Common Law and the statute 29 Car. II. c. 3, s. 12, and for the cases decided thereunder, the reader is referred to the former editions of this work (*x*). This statute was repealed by the Wills Act, 1837, 1 Vict. c. 26, s. 3 (which, however, does not extend to any Will made before January 1, 1838), by which section estates, *pur autre vie*, may be disposed of by Will, executed as required by that Act, whether there shall or shall not be any special occupant thereof, and of whatever tenure they shall be, and whether the same shall be a corporeal or incorporeal hereditament (*y*).

And with respect to the estate, *pur autre vie*, of any deceased person, *who shall not have died before the 1st day of January, 1838*, the same statute, (after repealing previous statutes relating to estates *pur autre vie*) proceeds to enact, by sect. 6, that if no disposition shall be made thereof by Will, and in case there shall be no special occupant thereof, it shall go, (whether freehold or customary freehold, tenant right, customary or copyhold (*z*), or of any other tenure, *and whether a corporeal or incorporeal hereditament*), to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor

Equitable interests in terms.

Estates *pur autre vie*.

Stat. 1 Vict. c. 26, s. 3.

Stat. 1 Vict. c. 26, s. 6.

(u) *Billinghurst v. Spearman*, 1 Salk. 297. *Ackland v. Pring*, 2 Mann. & Gr. 937. As to his liability to pay the rent and perform the covenants of his lease, notwithstanding he has no assets, see post, Pt. IV. Bk. II. Ch. I. § II.

(x) Pt. II. Bk. II. Ch. I. § I.
(y) See this enactment, *verbatim*, in Preface.

(z) The statute of Car. II. did not extend to copyholds: *Zouch v. Forse*, 7 East, 186.

or administrator, either by reason of special occupancy, or by virtue of this Act, it shall be assets in his hands, and shall go in the same manner as the personal estate (a).

Mortgages :

With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, formerly, at law, this depended on the fact whether the mortgage was in fee or for years : in the former case the legal estate in the land descended to the heir ; and in the latter, it went, like any other term for years, to the executor : But with regard to the money due upon the mortgage, it was fully established in equity, that, in every case, it was to be paid to the executor or administrator of the mortgagee ; by reason of the rule of equity that the satisfaction shall accrue to the fund that sustained the loss (b). Consequently, if the mortgage were in fee, the heir or devisee of the mortgagee was a trustee of the land for the executor or administrator ; and would, upon application, be directed to convey to him (c). So if the land became irredeemable in the hands of the heir, either by the length of possession, or by his purchasing the equity of redemption, or foreclosing, it nevertheless belonged to the personal representative, and the heir was considered a trustee for him (f). And now in all cases of death after December 31, 1881, it is provided by the Conveyancing Act, 1881, sect. 30, that all estates vested in any person solely by way of mortgage shall on his death, notwithstanding any testa-

considered
part of the
personal
estate :

44 & 45 Vict.
c. 41, s. 30.

(a) See this enactment, *verbatim*, post, Pt. IV. Bk. I. Ch. I. In the construction of it, in a case where leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, executors, administrators, and assigns, and A. survived the deviser, and being illegitimate, died without heirs and intestate, living the *cestui qui vie*, it was held that the section applied to equitable estates in land, and that the devised estates passed under it to A.'s

administrator (the nominee of the Crown) : *Reynolds v. Wright*, 2 De G. F. & J. 590. 25 Beav. 100.

(b) *Thornbrough v. Baker*, 1 Chanc. Cas. 283.

(c) *Ellis v. Guavas*, 2 Chanc. Cas. 50.

(f) *Ibid.* *Canning v. Hicks*, 2 Chanc. Cas. 187. *Tabor v. Grover*, 2 Vern. 367. But it should seem, that if the heir chooses, he may pay off the mortgage money to the executor, and retain the land : *Clerkson v. Bowyer*, 2 Vern. 66.

mentary disposition, devolve to and become vested in his personal representatives as if the same were a chattel real, and for the purposes of this section the personal representatives of a deceased person are to be deemed his heirs and assigns within the meaning of all trusts and powers.

But the mortgagee may, as between his real and personal representative, by a manifest declaration of his intent, convert the mortgage, as well as any other part of his personal estate, into land, and make it pass accordingly (g). So if a man purchase an estate, which afterwards proves to be subject to an equity of redemption, and dies, the money will belong to his heir, and not his executor (h). Again, if mortgage money be articulated to be laid out in land and settled, the money will be bound by the articles (i). So if the mortgagee in his lifetime obtain a release of the equity of redemption, or obtain an absolute decree of foreclosure, and enter into possession, and after his death, the foreclosure shall be opened, or the release set aside, the heir, and not the executor, will be entitled to the money (k).

in what case
the heir
entitled :

If the mortgagee becomes entitled to the land in fee simple, as if it descends upon, or is devised to him, question may arise between his heir and executors, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest arises, whether the charge be kept on foot, or not, it will be extinguished in equity upon the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (l). But if a

when a mort-
gage merges :

(g) *Noys v. Mordaunt*, 2 Vern. 561. *Ante*, p. 579.

(h) *Cotton v. Iles*, 1 Vern. 271. *Coote on Mortg.*, 5th ed., 1122.

(i) *Lawrence v. Beverley*, cited 3 P. Wms. 217, in *Lechmere v. Carlisle*.

(k) *Ibid*.

(l) 2 Powell Dev. 146, *Jarman's* edit. *Grice v. Shaw*, 10 Hare, 76. When the owner of an estate has also a charge on it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say that without some

tate. [Pt. II. Bk. II.

cial occupancy, or by his hands, and shall state (a).

tor or administrator ty, formerly, at law, mortgage was in fee or l estate in the land er, it went, like any

But with regard to s fully established in paid to the executor reason of the rule of ue to the fund that f the mortgage were agee was a trustee of or; and would, upon (e). So if the land e heir, either by the asing the equity of ess belonged to the considered a trustee death after Decem-

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Canning v. Hicks, 2 187. *Tabor v. Grover*, 7. But it should seem, heir chooses, he may e mortgage money to r, and retain the land: *Bowyer*, 2 Vern. 66.

purpose, beneficial to the owner, can be answered by keeping the charge on foot, so that the charge would be disposable by him, though the land would not (*m*): or a beneficial use might have been made of it against a subsequent incumbrancer (*n*), or the other creditors of the person from whom the party derived the onerated estate (*o*): in these, and similar cases, equity will consider the charge as subsisting, notwithstanding that it may have been merged at law (*p*): and the rule is adopted in favour of the creditors of the person in whom these interests centre (*q*).

title of executor of mortgagor in case of a mortgage with power of sale.

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate, as the equity of redemption descends to the heir-at-law (*r*).

Devise of land to executors for payment of debts.

At common law, where a man devised land to his executors for payment of his debts, or until his debts were paid, or till a particular sum should be raised out of the rents or profits, the executors took thereby only a chattel interest, *i.e.* an estate for so many years as were necessary to raise the sum required (*s*): and this interest determined when the rents or profits would have raised the sum, although the executors might have misapplied them (*t*). But by stat. 1 Vict. c. 26, s. 30, where

special act, no presumption can be made of an intention to merge the charge in fee; for that might be against the interest of the owner by letting in the intermediate estate or incumbrance: But where the intermediate interest is created by the act of the owner himself, this reasoning has no application: *Johnson v. Webster*, 4 De G. M. & G. 474, 488, by Lord Cranworth.

(*m*) *Thomas v. Kemeys*, 2 Vern. 348.

(*n*) *Gwillim v. Holland*, cited 2 Ves. Jun. 263.

(*o*) *Forbes v. Moffat*, 18 Ves. 384.

(*p*) *Powell*, Dev. *ubi supra*. *Byam v. Sutton*, 19 Beav. 556.

(*q*) *Powell v. Morgan*, cited 2 Vern. 206. *Powell*, Dev. *ubi supra*.

(*r*) *Wright v. Rose*, 2 Sim. & Stu. 323. *Bourne v. Bourne*, 2 Hare, 35.

(*s*) *Hitchens v. Hitchens*, 2 Vern. 404. *Ackland v. Lutley*, 9 A. & E. 879. *Ackland v. Pring*, 2 M. & Gr. 937.

(*t*) *Carter v. Barnadiston*, 1 P. Wms. 509, 519. *Ackland v. Lutley*, 9 A. & E. 879.

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any real estate, (other than a presentation to a church), shall
be devised to any trustee or executor, such devise [if the Will
be made on or after January 1, 1838] shall pass the fee simple
or other the whole estate of the testator, unless a definite
term of years, or an estate of freehold, shall thereby be given
to him expressly or by implication (u).

Stat. 1 Vict.
c. 26, s. 30.

SECTION II.

Right of Executors and Administrators to Chattels Real, with relation to Husband and Wife.

Before quitting the inquiry as to the interest which
executors and administrators have in the chattels real of the
deceased, it is proper to consider the subject as it bears on
the relation of husband and wife. It is therefore proposed
to investigate, 1st, when the wife survives, the rights of the
executor or administrator of the husband to her chattels
real: 2nd, when the husband survives, the rights of the
administrator of the wife to the same.

This subject has, however, become of much less practical
importance than formerly by reason of the Married Women's
Property Act, 1882 (45 & 46 Vict. c. 75).

45 & 46 Vict.
c. 75.

By section 1 (1) of the Married Women's Property Act,
1882 (45 & 46 Vict. c. 75), it is enacted that "a married
woman shall in accordance with the provisions of this Act be
capable of acquiring, holding, and disposing by Will or other-
wise of any real or personal property as her separate property
in the same manner as if she were a *feme sole* without the
intervention of any trustee (x).

By section 2 of the Married Women's Property Act, 1882,
every woman who marries *after* the commencement of that

- (u) See also 1 Vict. c. 26, s. 31. terms of this sub-section, it would
(x) Notwithstanding the wide seem that the devolution of the

Act [viz. January 1, 1883], is entitled to have and to hold as her separate property, and to dispose of by Will, or otherwise, in the same manner as if she were a *feme sole*, all real and personal property belonging to her at the time of marriage,

chattels real of the wife is unaltered, and that the effect of the Act is merely, 1. That the husband is deprived of the power of divesting his wife of her chattels real during coverture, and 2. That if the wife do not alien her chattels real in her lifetime, or by her Will, and the husband survive her, he will take such chattels real as are affected by the Act, not as a marital right, but as the administrator of his wife. In other words, this enactment does not affect the devolution of the wife's property but only the "*jus mariti*," and it would seem, therefore, that, although under each of the above-mentioned sections (2 and 5) the married woman is entitled to have and to hold the property as her separate property, and to dispose of it "in manner aforesaid," i.e., "as if she were a *feme sole*" (sect. 1 (1)), the statute only means that she is to have the legal estate in the property, and that, therefore, if she dies without having aliened or disposed of it by Will her husband will have no right to it "*jure mariti*," because it never was his, yet he will still have the right (continued to him by the Statute of Frauds notwithstanding the Statute of Distributions) to administration and enjoyment of his wife's assets. The question, however, remains whether the M. W. P. A., 1882, affects property acquired before 1 Jan.,

1883, by a woman married before that date. The only section that could operate upon such property would seem to be section 1, sub-s. (1), above set out. The scope of this sub-section seems to be to declare the *status* of a married woman. The Act nowhere contains any provision divesting the husband of the qualified interest in his wife's chattels real vested in him before the passing of the Act. As to undisposed of separate property accrued to a married woman before the Act, it has been held by Stirling, J., in *Re Lambert*, 39 C. D. 626, that the husband's right to such property is unaffected by sect. 1 (1) of the M. W. P. Act, 1882. The learned Judge points out that, even before the Act, a married woman might always dispose of her separate property by Will, but that, to the extent that she did not, the husband's right accrued on her death. This right he held to be unaffected by the Act. The result as to chattels real acquired before 1 Jan. 1883, by a woman married before that Act, would seem to be that letters of administration are unnecessary in cases where the husband survives the wife, unless indeed the interest of the wife consists of a mere right of action. See *Re Bellamy*, 25 C. D. 620. *Surman v. Wharton* [1891], 1 Q. B. 491.

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or acquired by, or devolving on, her after marriage, and by
sect. 5 every woman married *before* the commencement of the
Act [viz. January 1, 1883], is entitled to have and to hold,
and to dispose of by Will, or otherwise, in the same manner
as if she were a *feme sole*, as her separate property all real
and personal property, her title to which, whether vested, or
contingent, and whether in possession, reversion, or remainder,
accrues after the commencement of the Act (y).

The effect of this Act is, it seems, to extend the power which
before the Act a married woman possessed to dispose of
such chattels real as were settled to her separate use, and to
give the same power to a woman married before January 1,
1883, in respect of any chattels real, her title to which accrues
to her after that date, and to a woman married on, or after
January 1, 1883, in respect of all chattels real, whensoever
and howsoever her title to them may accrue.

It follows that if the wife survive her husband his executor
or administrator has no right whatever to such chattels,
as by the statute are made the separate property of the
wife, but the property in them remains in, and survives to,
the wife.

And, if the husband survive the wife, it would seem that
in respect of those chattels real over which a wife by the
statute has a complete power of disposal as if she were a
feme sole, if she die intestate without disposing of them, her
husband has a right to them as her administrator, and to esta-
blish his title he must take out administration to her.

Having regard to the numerous cases which must arise in
the case of chattels real of the wife not affected by the Married
Women's Property Act, 1882, it is considered convenient to

(y) Women, however, married
before 1 Jan., 1883, in addition to
the powers conferred on them by
this Act still retain the same
power to dispose of chattels real
settled to their "separate use," or

(if married on or after 9 Aug.,
1870) of chattels real acquired by
them as next of kin of an intestate,
as they possessed at the commence-
ment of this Act: see sects. 19 and
22.

reprint the text as it existed in the last edition of this work prior to the passing of that Act.

Law as to Chattels Real of the Wife not affected by the Married Women's Property Act, 1882.

As to the law previous to the passing of the Married Women's Property Act, 1882, the common law gives a qualified interest to the husband in the chattels real of which the wife is, or may be, possessed during marriage, viz., an interest in his wife's right with a power of divesting her property during the coverture.

1. The right of the husband's executor, &c., to the wife's chattels real : if they remain *in statu quo*, and she survive, she will be entitled, and not her husband's executors : what amounts to a disposition of the wife's chattels real by the

1. If therefore he so disposes of his wife's terms, or other chattels real, by a complete act in his lifetime, her right by survivorship will be defeated (a) : but if he leave them *in statu quo*, and the wife be the survivor, she will be entitled to them, to the exclusion of the executors or administrators of her husband (b).

It becomes, therefore, necessary to inquire what shall amount to such a disposition of the wife's chattels real by the husband, as will exclude her title by survivorship : and as the object of this Treatise is merely to show what interest the executor or administrator of the husband takes by the

(a) And since the same rule of property must prevail in equity as in law, if the wife in a case not affected by the M. W. P. Acts be entitled to a term for years, held *in trust* for her benefit, the assignment or alienation of it by her husband will bind her surviving him : *Bates v. Dandy*, 2 Atk. 207. 1 Bacon, Abr. Baron and Feme (C. 2). 1 Roper, Husb. and Wife, 177, 2nd edit. : unless the husband, before marriage, consent to the settlement of the term for her benefit : *Sir Edw. Turner's case*, 1 Vern. 7. (See as to trusts for her separate use, *post*, Pt. II.

Bk. II. Ch. II. § III.) So, apart from the M. W. P. Acts, the contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband ; and the wife surviving will be bound by such sale though the husband dies before the contingency is determined or the reversion falls into possession : *Donne v. Hart*, 2 Russ. & M. 360. *Secus*, where the interest cannot possibly vest during the coverture : *Duberley v. Day*, 16 Beav. 33.

(b) 1 Roper, Husb. and Wife, 173, 2nd edit.

dition of this work

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defeat of the wife's claim, the instances selected will be confined to cases where the question is between her and the executor or administrator, and not between her and an alienee. The general principle is, that the transaction must be of a description to effect a complete alteration in the nature of the joint interest of the husband and wife in the wife's chattels real.

The Will of the husband cannot dispose of the chattels real of the wife, against her surviving him; for as that does not take effect till *after* his death, the law takes precedence, and vests the term in the wife immediately upon his decease (c).

If the husband and wife be ejected of a term which he enjoyed in her right, and he commences an action of ejectment in *his own name*, and obtains judgment, the recovery will change the wife's property in the term, and vest it in the husband (d).

It seems that if there is a dispute between the husband, claiming a term of years in right of his wife, and another person, relative to the title, and they refer the matter to arbitration, and an award is made of the term to the husband, the property in it will be changed by the arbitration, so as to amount to a reduction of the term into possession which will defeat the wife's right by survivorship (e).

If the wife, at the time of her marriage, were a lessee for years, and her husband purchases or takes a lease of the lands for both their lives, that act will amount to a dis-

husband, so
as to bar her
right by sur-
vivorship:

the husband's
Will does not:

effect of hus-
band's pro-
ceedings at law
in his own
name for the
wife's term:

effect of hus-
band's sub-
mitting the
title to his
wife's term to
arbitration:

effect of the
husband
taking a new
lease of the
land in which
the wife has
a term:

(c) 2 Black. Comm. 434. 1 Roper, Husband and Wife, 174, 2nd edit.

(d) Co. Lit. 46, b. Com. Dig. Baron and Feme (E. 2). Bacon, Abr. tit. Baron and Feme (C. 2); but see Brett v. Cumberland, 1 Roll. Rep. 359, in which Coke, C.J., says, "A man hath a term in right of his wife; he is ousted

of it, and brings his action, and recovers the same again, and hath his judgment; he shall have it in *statu quo*." See also note (6) to Co. Lit. 46, b. Hal. MSS.

(e) 1 Roll. Abr. 245, Arbitrament (D.): but see Mr. Roper's note, vol. i, 185, 2nd edit., and Hunter v. Rice, 15 East, 100.

position of the term: because, by the acceptance of the second lease the term is surrendered by operation of law, which surrender the husband is enabled to make under his general authority to dispose of the wife's leases in possession (*f*).

effect of an alienation of wife's term by husband on a condition which is broken and the land re-entered:

If the husband alone assign a term of which he is possessed in right of his wife, *subject to a condition*, and enter for the condition broken during the coverture, the husband will be again possessed in right of his wife as before; and the wife being the survivor may be entitled (*g*).

But if the husband die before the condition broken, his executors or administrators must enter for the breach of the condition, and will hold discharged of the title of the wife (*h*).

effect of husband's mortgaging his wife's chattels real:

If the husband mortgages the wife's term, and by payment of the money at the day, the estate of the mortgagee ceases, it seems that the interest of the wife in the term will not be affected (*i*). If the money be not paid at the day, the estate of the mortgagee becomes absolute, and the alienation of the term being complete at law, the wife's legal right by survivorship is defeated; and if the equity of redemption were reserved to the husband alone, it has been said that her right will also be defeated in equity, by analogy to the cases in which it has been held that she is bound by the husband's voluntary assignment of her equitable chattels real (*k*). But if the equity of redemption were reserved to the husband and wife she would be entitled to survivorship (*l*): And

(*f*) 2 Roll. Abr. Surrender (F.) p. 495, pl. 8. 1 Roper, Husband and Wife, 183, 2nd edit.

(*g*) 1 Roll. Abr. 344, l. 45—50. Bac. Abr. tit. Baron and Feme, (C. 2). 1 Prest. on Abstr. 345.

(*h*) Co. Lit. 46, b. Bac. Abr. tit. Baron and Feme (C. 2).

(*i*) Young v. Radford, Hob. 3. 1 Roper, Husband and Wife, 184, Jacob's edit.

(*k*) 1 Roper, Husband and Wife, 184, Jacob's edition. 1 Prest. on Abstr. 345. The latter writer adds "*sed quere.*"

(*l*) Pitt v. Pitt, 1 Turn. Chan. Rep. 180: In that case a feme sole made a mortgage of a leasehold house and afterwards married; the mortgage was then transferred; the husband joined in the transfer, and covenanted to pay the money:

acceptance of the operation of law, to make under his leases in posses-

of which he is positioned, and enter into the husband's wife as before; and (g).

condition broken, after the breach of the title of the

term, and by payment the mortgagee ceases, the term will not be, the day, the estate and the alienation of wife's legal right by equity of redemption has been said that her analogy to the cases and by the husband's chattels real (k). But reserved to the husband survivorship (l): And

per, Husband and Wife, 1st edition. 1 Prest. on The latter writer adds

v. Pitt, 1 Turn. Chan. In that case a feme sole mortgage of a leasehold afterwards married; the was then transferred; and joined in the transfer, wanted to pay the money;

unless his intention to defeat her right can be collected from the particular instruments of mortgage, it may be doubted whether it will be defeated by the reservation of the equity of redemption to him alone; for that this mere circumstance is not enough to rebut the ordinary presumption that nothing more is intended by the usual mortgage deed than that which is necessary to make the estate a security for the money advanced (m). If in any case the husband, after the estate of the mortgagee has become absolute, pays the money, and takes an assignment to himself, the property will be altered, and the term will go to the executors of the husband, to the exclusion of the wife (n).

The power which the law gives the husband to divest the whole interest of his wife, in her chattels real, necessarily authorizes him to divest it partially (o). If, therefore, the husband be possessed of a term for years in right of his wife, and he alone grants an underlease for a portion of the term reserving rent, he becomes the actual owner, to the extent of the term so granted, and the rent will form part of his executor's estate (p); but the residue of the original term will belong to her, as undisposed of by her husband (q).

Whether the husband's agreement to make an underlease of his wife's term for years will produce the same effect as

effect of husband making an underlease of the wife's term for years:

and the equity of redemption was reserved to the husband and wife, their executors, administrators, and assigns: It was held that the wife's right by survivorship was not affected: But on a bill by the wife to redeem the mortgage, the redemption was decreed on the terms, that the husband's estate should stand in the place of the mortgagee, for sums paid by him out of his property in reduction of the mortgage debt.

(m) *Clark v. Burgh*, 2 Coll. 221.

(n) 1 Prest. on *Abstr.* 346.

(o) *Bac. Abr.* tit. *Baron* and

Feme (C. 2).

(p) 6 Ves. 394, by Lord Eldon in *Druce v. Denison*. Had the husband and wife joined in the lease, the rent would have been incident to the reversion, as well after the death of the husband as during his life, and would have belonged to the wife: 1 Prest. on *Abstr.* 345. 1 *Roper, Husband and Wife*, 174, 175, 2nd edit.

(q) *Co. Lit.* 46, b. See *post*, Pt. II. Bk. III. Ch. I. § III. as to the party entitled to arrears of rent reserved on a lease of the wife's estate.

effect of husband's agreement for an underlease.

an actual lease, has never been expressly decided. The point was discussed in *Druce v. Denison* (r), though it became unnecessary to decide it: But Lord Eldon (s), intimated an opinion that the agreement would be good against the wife, and that the rent would form part of the husband's estate: He observed, that as to actual leases there was no doubt that, to the extent of the terms granted the husband became owner; as to the agreements for leases his apprehension was, that in a Court of Equity the husband was to be considered owner of those interests, and he compared it to an assignment of the wife's choses in action, which, though conferring no legal title, is supported in equity: On the case coming on again, his Lordship said, that he should wish a search to be made on the point, whether it had ever been decided that an agreement would or would not bind the wife; and if it would, whether the rent was to be paid to her or her husband: If that point was untouched by decision, he thought it would be found, that the analogy to other cases would make out that an assignment in equity was to this purpose as good as an assignment at law, and he referred to *Steed v. Cragh* (t), as stating the principle.

2. Rights of wife's administrator to her chattels real:

those vested during coverture go to the husband *jure mariti*:

2. The rights of the administrator of the wife to her chattels real when her husband survives. If the husband do not alien them in her lifetime, and he survive her, the law gives them to him, at least all those of which he had possession *jure uxoris* during the coverture, not as the administrator of his wife, but as a marital right (u). No administration to her, therefore, need be taken out by him for this purpose (x).

(r) 6 Ves. 385.

(s) 6 Ves. 395.

(t) 9 Mod. 43.

(u) *Secus*, as to a case whereof the wife and another were joint tenants; for it shall survive to her companion, inasmuch as he has the elder title to that of the husband: Co. Lit. 185, b. *Bracebridge v. Cook*, Plow. 416 418.

And if the husband in his lifetime had granted a rent-charge out of the term the wife survivor should avoid the charge and all other incumbrances, for she being the survivor is remitted to the term which the coverture does not divert out of her: *Bracebridge v. Cook*, Plow. 416, 418.

(x) 1 Roll. Abr. Baron and Feme

Consequently, should the husband die without exercising his exclusive right of taking out administration to her (y), her chattels real in possession will go to his administrator, and not to the administrator of his wife (z).

But to entitle the husband to the chattels real of the wife which were not vested in his possession in her right in her lifetime, he must make himself her representative, by becoming her administrator: As if a *feme sole* be possessed of a chattel real, and be thereof dispossessed, and then take husband, and die before recovery of possession, this right will not survive to the husband, but go to the personal representative of the wife (a). Therefore if the husband die without obtaining letters of administration, the right will not pass to his administrator, but to the administrator of his wife (b). However, such administrator will be considered in equity as a trustee for the representative of the husband (c).

secus, of those not vested.

If the husband be seised of an advowson in right of his wife, and the church become vacant during the coverture, the wife shall have the void presentation if she survive him, and the husband if he survive her (d), even though, by reason of her not having issue, he be not tenant by the curtesy (e): but if the church fell vacant *before* coverture, the husband shall not have the turn (f): *i.e.* it may be considered, he shall not have it as a marital right; but still it will go to

(H. 8). *Wrotesley v. Adams*, Plowd. 122. *Hauchet's case*, Dyer, 251, a. Co. Lit. 46, b. *Ibid.* 351, a. *Re Bellamy*, 25 C. D. 620. And the same of an equitable term: *Rex v. Holland, Aleyn*, 15, by Rolle. 1 Prest. on Abst. p. 343.

(y) See *ante*, p. 346.

(z) *Doe v. Polgrean*, 1 H. Black. 535.

(a) Co. Lit. 351, a. The illustration refers to a mere right of action and not to a case where the wife dies before the interest vested in possession. Thus where a wife

is entitled to a term subject to a life estate therein and predeceases her husband during the subsistence of the life estate, it is not necessary for the husband to take out letters of administration in order to complete his title to the leaseholds: *Re Bellamy*, 25 C. D. 620. See also *Doe v. Polgrean*, 1 H. Black. 535.

(b) *Ante*, pp. 349, 350.

(c) *Ante*, p. 349.

(d) Co. Lit. 351, b.

(e) Wats. C. L. 71, 72.

(f) Co. Lit. 351, b.

him as her administrator (g). It will be observed that the next presentations to vacant churches are not properly chattels real, but chattels personal, and, therefore, in strictness do not belong to this part of the subject of the estate of an executor or administrator.

SECTION III.

Of the Estate of an Executor or Administrator in Chattels Real by Condition, Remainder, or Limitation.

By condition.

An executor or administrator may become entitled to chattels real by condition. As where a lease for years has been granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts as the testator appointeth, &c., and the condition is not performed after the testator's death, now is the chattel real come back to the executor (h). So where the condition is, that the testator or his executor shall pay the money to avoid the grant, as where he mortgaged a lease for years and before the day limited for redemption he dies, his executor is entitled to redeem at the time and place appointed (i).

By remainder.

Likewise a chattel real may accrue to an executor or administrator by remainder. Thus a remainder in a term of years, though it never vested in the testator in possession, and though it continue a remainder, shall go to his executor. Where a lease for years is bequeathed by Will to A. for life, and afterwards to B., who dies before A., although B. never had the term in possession, yet it shall devolve on his executors (k).

Contingent and executory interests.

With respect to contingent and executory interests, it is established, that contingent and executory estates, and possibilities in chattels real, accompanied by an interest, are

(g) See *infra*, Pt. II. Bk. III.
Ch. I. § III.

(h) Wentw. Off. Ex. 181, 14th edit.

(i) Wentw. Off. Ex. 181, 14th edit. Toller, 164.

(k) Wentw. Off. Ex. 180, 14th edit.

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tw. Off. Ex. 181, 14th
ler, 164.

tw. Off. Ex. 189, 14th

transmissible to the personal representative of a person dying before the contingency upon which they depend takes effect (l). Thus, in the case above put, where a lease for years is bequeathed to A. for life, and after his death to B. for the residue of the term, B. has only an executory interest during the life of A.; but this interest is transmissible to B.'s executors or administrators (m).

Lord Coke says, that "if a man make a lease for life to one, the remainder to his executors for twenty-one years, the term of years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vested in A., as it had been limited to him and his heirs), even so are the testators and executors *correlativa* as to any chattel. And, therefore, if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors (n).

Lease for life,
remainder to
the executors
of lessee.

(l) *Fearne*, 554. 2 *Saund.* 388, n. note (9), to *Purefoy v. Rogers*. See post, Pt. II. Bk. II. Ch. III.

(m) *Manning's case*, 8 Co. 95. *Lampet's case*, 10 Co. 46: and see Mr. Fraser's notes in his edition of Coke's Reports.

(n) Co. Lit. 54, b. In the former editions of this work reference was made at length to the cases of *Sparke v. Sparke* (Cro. Eliz. 663); *Sparke v. Sparke* (Cro. Eliz. 840); *Cranmer's Case* (Dyer, 309); *Finch v. Finch* (Moor. 339); and *Remington v. Savage* (Moor. 745), together with the MS. note by Mr. Serjeant Hill in his copy of Viner in Lincoln's Inn Library, with a view to reconcile the conflicting decisions on this subject. It is not thought desirable to do more

in the present edition than to cite the conclusion arrived at by Mr. Serjeant Hill in his MS. note above referred to in which he says: "On the whole the difference seems to be this, that if a lease be made for life or years, with a remainder to the executors of the lessee, it shall be a vested interest in the lessee, and, consequently, if he dies intestate shall go to his administrator. But if there be a lease for ninety-nine years, if the lessee live so long, with a proviso that if he die within the term it should be to his executors for forty years, this last term shall not vest in the lessee but in his executors by purchase, because it is a conditional limitation and a mere

Administrator
cannot take as
assignee by
purchase.

It has been several times laid down, that if a remainder be limited to a man's *executors and assigns*, as purchasers, there his administrator cannot take as assignee (o).

"possibility to vest, for this is the
"point agreed in Cro. Eliz. 841.
"*Quere* tamen whether it would
"not now be considered as more
"than a possibility. See Fearne,

"1617."

(o) See Sparke v. Sparke, Owen,
125. Sparke v. Sparke, Cro. Eliz.
840, 841.

CHAPTER THE SECOND.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR IN THE
CHATTELS PERSONAL OF THE DECEASED IN POSSESSION.

CHATTELS personal are, properly and strictly speaking, things *moveable*; which may be annexed to, or attendant on, the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can be properly put in motion, and transferred from place to place (a). All these, and other things of the same nature, generally speaking, belong to the estate of the executor or administrator.

What are
chattels
personal.

It is proposed to consider this subject in the usual divisions;
1. Chattels animate. 2. Chattels vegetable. 3. Chattels inanimate.

SECTION I.

Of the Estate of an Executor or Administrator in Chattels Animate.

Chattels animate may be sub-divided into such as are domestic and such as are *feræ naturæ*. In such as are of a nature tame and domestic (as horses, dogs, kine, sheep, poultry, and the like), a man may have an absolute property, and they are therefore capable of being transmitted, like any other personal chattel, to his executor or administrator (b).

Domitæ naturæ.

In those of a wild nature, *i.e.* such as are usually found at *Feræ naturæ*:

(a) 2 Black. Comm. 387, 388.

(b) 4 Burn. F. L. 297. It is said, indeed, in Swinburne, Pt. 7, s. 10, pl. 8, p. 929, 7th edit., and in Noy's Maxims, p. 107, that hawks and hounds shall go to the heir with the estate. But it seems

clear at this day, that they would go to the executor or administrator as chattels personal. "And why not?" says the author of the Office of Executor (supposed to be Mr. Justice Doddridge), "for although hounds, greyhounds, and

liberty and wandering at large, generally speaking, a man can have no property transmissible to his representatives (c).

property per
industriam in
animals *feræ*
naturæ goes to
executors :

But a qualified property may subsist in animals of the latter class, *per industriam hominis*, by a man's reclaiming them and making them tame by art, industry, or education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty (d), and the animals so reclaimed or confined belong to the executor or administrator. Thus, if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators : So, though they were not tame, yet if they were kept alive, in any room, cage or such like place ; as fish in a trunk (e). But if at any time they regain their natural liberty, the property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning (f).

property
propter impo-
tentiam in
them.

A qualified property may also subsist in animals *feræ naturæ propter impotentiam* ; as in young pigeons, who though not tame, being in the dove-house, are not able to fly out ; and they shall go to the executors or administrators (g).

What animals
are incident to
the inheri-
tance and shall
not go to the
executor :

Deer in a
park :

The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. Thus deer in a park (h) (*i.e.* as it should seem, in a park properly so called which must be either by grant or prescription) (i), comes in

spaniels be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as instruments of music, both tending to delight and exhilarate the spirits : a cry of hounds bath, to my sense, more spirit and vivacity than any other." Wentw. Off. Ex. 143, 14th edit.

(c) 2 Black. Comm. 390, 391.

(d) 2 Black. Comm. 390.

(e) Wentw. Off. Ex. 143, 14th edit.

(f) 2 Black. Comm. 392.

(g) Wentw. Off. Ex. 143, 14th edit.

(h) Co. Lit. 8, a. Wentw. Off. Ex. 127, 14th edition.

(i) *Davis v. Powell*, Willes, 46, in which case it was held, that deer in an enclosed ground, in which deer had been usually kept, and which was therefore called a park, might be distrained for rent. And it has been lately held that deer in an ancient and *legal* park may be so tame and reclaimed from their natural wild state as to pass

speaking, a man can
representatives (c).

in animals of the
a man's reclaiming
industry, or education,
immediate power,

natural liberty (d),
ained belong to the

deceased have any
or partridges, they

s: So, though they
alive, in any room,
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able to fly out; and
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tw. Off. Ex. 143, 14th

Lit. 8, a. Wentw. Off.
4th edition.

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an enclosed ground, in

had been usually kept,
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s been lately held that
ancient and legal park
tame and reclaimed from
ral wild state as to pass

a warren, doves in a dove-house, will not go to the executor
or administrator (k). And the reason assigned by Lord
Coke, is, because, without them, the inheritance would be
incomplete. Another and more obvious reason mentioned
by Lord Coke in the same case, is, that the deceased had not
any property in them (l).

So, if a man buys fish, as carps, bream, tenches, &c., and
puts them into his pond, and dies, in this case the heir who
has the water shall have them, and not the executors; but
they shall go with the inheritance; because they were at
liberty and could not be gotten without industry, as by nets
and other engines (m), otherwise (as it has already been
said) (n), if they are in a trunk, or in a net, or the like; for
then they are severed from the soil (o).

But if the deceased has only a term for years in the lands
in which the park, warren, dove-house, or pond is situate,
the deer, conies, doves, and fish will go to the executor or
administrator as accessory chattels, following the estate of
their principal, *viz.*, the park, warren, dove-house, or pond (p).
It must, however, be understood, that the executor or ad-
ministrator can have no further interest than the deceased

Conies in a
warren :
Doves in a
dove-house :

Fish :

but if the
deceased was
termor for
years, the
deer, fish, &c.,
go to the
executor :

to executors as personal property :
Morgan v. Earl of Abergavenny,
8 C. B. 768. Ford v. Tynte, 2
John. & H. 150.

(k) Com. Dig. Biens(B.), Wentw.
Off. Ex. 127, 14th edition.

(l) The case of Swans, 7 Co.
17, b. But though animals *feræ*
nature are not, while living, the
personal chattels of the owner of
the soil, yet if they are found and
killed on the land by a trespasser,
the qualified property in them
ratione soli becomes absolute in
the owner of the soil : Blades v.
Higgs, 12 C. B., N. S. 501. 13
C. B., N. S. 844 : Affirmed in
Dom. Proc., 11 Jurist, N. S. 701.
As to Bees, see 2 Black. Comm.

393. In Hannam v. Mockett, 2
B. & C. 944, Bayley, J., says, that
bees are property, and are the
subject of larceny. The reader
is also referred on these matters
generally, to the Treatise on the
Law of Fixtures, &c., p. 167,
et seq., by Messrs. Amos and
Ferard, from which excellent
work the author has derived great
assistance in compiling this and
the following part of the present
Book.

(m) Co. Lit. 8, a.

(n) *Ante*, p. 618.

(o) Bac. Abr. tit. Executors
(H. 3), vol. iii. 64.

(p) Wentw. Off. Ex. 127, 14th
edit. Godolph. Pt. 2, c. 13, s. 4.

had in them, *i.e.* a right to take to his own use as many as he pleases, during his term, provided he leaves enough for the stores; for if a lessee for years of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste (*q*), and will be equally waste in his executor or administrator.

SECTION II.

Of the Estate of an Executor or Administrator in Chattels Vegetable.

What growing things shall go to the heir :

Trees and fruit not severed :

certain cases where growing trees go to the executor :

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree, when severed from the body of it, or the whole plant or tree itself, when severed from the ground (*r*). But unless they have been severed, trees, and the fruit and produce of them, from their intimate connexion with the soil, follow the nature of their principal, and therefore, when the owner of the land dies, they descend to his heir, and do not pass to his executor or administrator (*s*). Hence apples, pears, and other fruits, if hanging on the trees at the time of the death of the ancestor, shall go to his heir, and not to his executor or administrator (*t*). So it is of hedges, bushes, &c.; for all these are the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow.

Some cases, however, exist, where even growing timber trees, are, owing to special circumstances, considered as chattels, and as such will pass to the executor or administrator. Thus, if tenant in fee simple grants away the trees they are absolutely passed from the grantor and his heirs, and vested in the grantee; and if the latter should die before they are felled, they will go to his executor or administrator: for

(*q*) Co. Lit. 53, *a*.

(*r*) 2 Black. Comm. 389.

(*s*) Swinb. Pt. 7, s. 10, pl. 8.
Re Ainslie, 30 C. D. 485.

(*t*) Swinb. Pt. 7, s. 10, pl. 8.
Wentw. Off. Ex. 146, 147, 14th
edit. *Rodwell v. Phillips*, 9 M. &
W. 501.

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in consideration of law, they are divided as chattels from the freehold (*u*). So where tenant in fee simple sells the land and reserves the trees from the sale, the trees are in property divided from the land, although, in fact, they remain annexed to it, and will pass to the executors or administrators of the vendor (*x*). But if the person so entitled to the trees distinct from the land, afterwards purchases the inheritance, the trees will be re-united to the freehold in property, as they are *de facto*, and descend to the heir (*y*). Yet if the tenant in fee simple lease the land for years, excepting the trees, and afterwards grants the trees to the lessee, they are not by this means re-annexed to the inheritance, but the lessee has an absolute property in them, which will go to his executors or administrators (*z*).

So if tenant in tail sells the trees to another, they are a chattel in the vendee, and his executors or administrators shall have them; and in such case also, *fictione juris*, they are severed from the land; but if the tenant in tail dies *before actual severance*, as to the issue in tail, they are part of his inheritance, and shall go with it, and the vendee or his executor cannot take them (*a*). The law, it may be presumed, is the same with respect to the vendee of a tenant in tail after possibility of issue extinct, or a tenant for life without impeachment of waste (*b*). And it seems that Equity would not afford relief (*c*).

With respect to the property in trees and bushes when severed, there seems to be a material difference between such trees as, by the general law of the land, or by the custom of

when trees, &c., that are severed go to the executor.

(*u*) *Stukeley v. Butler*, Hob. 173. *Wentw. Off. Ex.* 148, 14th edit. *Com. Dig. Biens* (H).

(*z*) *Herlakenden's case*, 4 Co. 63, *b*. *Wentw. ubi supra*.

(*y*) 4 Co. 63, *b*. *Anon. Owen* 48.

(*a*) 4 Co. 63, *b*.

(*b*) *Liford's case*, 11 Co. 50, *a*: for, it was said, timber trees cannot

be felled with a goose quill.

(*b*) *Pyne v. Dor*, 1 T. R. 55. *Bishop of London v. Webb*, 1 P. Wms. 528.

(*c*) See *Treat. on Equity*, B. 1, c. 4, s. 19, that no act of tenant in tail shall be carried into execution in a Court of Equity, any further than at law: for this would be to repeal the statute *de donis*.

the country where they grow, are timber, and such as are not. For if tenant in dower, or by the curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber trees, or a stranger does so, or the wind blows them down, the trees so severed shall not go to the tenant, or to his executor, but to the owner of the first estate of inheritance in the land (*d*). On the other hand, if such a tenant cuts down hedges or trees, not timber, or they are severed by the act of God, the tenant shall have them (*e*): and, consequently, his executor or administrator. So if trees are blown down, which are in their nature timber, but are dotards without any timber in them (*f*), or if such are wrongfully severed by the lessor, they belong to the tenant, and will pass to his executors (*g*).

Emblements :

There are, however, certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the occupier's death, yet, as

(*d*) Herlakenden's case, 4 Co. 63, *a*. Bewick v. Whitfield, 3 P. Wms. 268; in which case Lord Chancellor Talbot said, that this was so decreed upon the occasion of the great windfall of timber on the Cavendish estate. So if tenant for life without impeachment of waste commits equitable waste by cutting ornamental timber: Lushington v. Boldero, 15 Beav. 1. Ormonde v. Kynnersley, *ibid.* 10. But a tenant for life, though subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber trees cut by order of the Court of Chancery, on account of their being in a decaying state, by reason of standing too thickly: Tooker v. Annesley, 5 Sim. 235. Consett v. Bell, 1 Y. & Coll. C. C. 569.

(*e*) Com. Dig. Biens (H). Berryman v. Peacock, 9 Bingh. 384. A

testator devised estates on which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales. The Court of Appeal held that, having regard to the maxim *quidquid plantatur solo, solo cedit*, the principle applicable was that, if a tree was attached to the soil, it was real estate, and if severed, personalty: that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree: *Re Ainslie*, 30 C. D. 485.

(*f*) Herlakenden's case, 4 Co. 63, *a. b*. Countess of Cumberland's case, Moore, 812.

(*g*) Channon v. Patch, 5 B. & C. 897.

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between the executor or administrator of the person seised of the inheritance, and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainder-man or reversioner, in others, are considered by the law as chattels (*h*), and will pass as such. These are usually called emblements.

The vegetable chattels so named, are the corn and other growth of the earth, which are produced annually, not spontaneously, but by labour and industry, and thence are called *fructus industriales*. When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature and dies before harvest time, the law gives to his executors or administrators the profits of the crop *Emblavence de bled*, or Emblements, to compensate for the labour and expense of tilling, manuring, and sowing the land (*i*). The rule is established as well for the encouragement of husbandry and the public benefit (*k*), as on the consideration, in the case of tenant for life, that the estate is determined by act of God, and that the maxim of law is, *actus Dei nemini facit injuriam* (*l*).

(h) They are in fact not only in this respect, but in most others looked upon as chattels: for the rule seems now to be established, that all those vegetables which go to the executor, and not to the heir, are for most purposes considered mere chattels. They may consequently be seized and sold under a *fieri facias*; and the sale of them while growing is not a contract, or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the 4th section of the Statute of Frauds: but a sale of goods, wares, and merchandise, within the 17th section: See the judgments of Bayley and

Littledale, Justices, in *Evans v. Roberts*, 5 B. & C. 829; and of Hullock, B., in *Scorell v. Boxall*, 1 Younge & Jerv. 398. See also *Jones v. Flint*, 10 A. & E. 753. In the case of *Brantom v. Griffiths*, 1 C. P. D. 349, it was held that growing crops are not personal chattels within the Bills of Sale Act, 1854. Growing crops, however, if separately assigned are personal chattels within the Bills of Sale Acts, 1878 and 1882.

(i) Swinb. Pt. 7, s. 10, pl. 8.

(k) 2 Black. Comm. 122.

(l) By Lord Hardwicke, in *Lawton v. Lawton*, 3 Atk. 16.

to what
produce the
doctrine of
emblemments
extends :

corn, hemp,
h. r., saffron,
&c. :

melons : hops :
potatoes :

not to fruits
growing :
or young trees
planted :

nursery
grounds, &c. :

The doctrine of emblemments extends not only to corn and grain of all kinds, but to every thing of an artificial and annual profit, that is produced by labour and manurance (*m*): as hemp, flax, saffron, and the like (*n*); and melons of all kinds (*o*); and hops also, although they spring from old roots, because they are annually manured, and require cultivation (*p*); and so of potatoes (*q*).

But the rule does not apply (as it has already appeared), to fruit growing on trees (*r*); nor to the plantation of trees: for the general rule is, *quidquid plantatur solo, solo cedit*; and when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to him in future, and to future successions of tenants (*s*). Therefore, if a man sow the land with acorns, or plant young fruit trees, or oak, elm, ash, or other trees, these cannot be comprehended under emblemments (*t*). The case of trees, shrubs, and other produce of their grounds planted by gardeners and nurserymen, with an express view to sale, may be mentioned as an exception; for they are removable by them or their executors, as emblemments are (*u*).

(*m*) Co. Lit. 55, *b*.

(*n*) *Ibid.* Wentw. Off. Ex. 147, 14th edition.

(*o*) Wentw. Off. Ex. 153, 14th edit. The author of that book expresses his opinion, that artichokes go to the heir, as they have not that yearly setting or manurance as should sever them in interest from the soil: *Ibid. sed quere.*

(*p*) The authorities, however, do not prove that the person who planted the young hops, or his personal representatives, will be entitled to the first crop, whenever produced: *Graves v. Weld*, 5 B. & Adol. 105, 120. As to Teazles, see *Kingsbury v. Collins*, 4 Bing. 202.

(*q*) *Evans v. Roberts*, 5 B. & C. 832, by Bayley, J. It is said in

Godolphin, Pt. 2, c. 14, s. 1, that things under ground, whether in gardens or elsewhere, as carrots, parsnips, turnips, or skerrets, shall go to the heir; and the same is said in *Wentw. Off. Ex.* 152, 14th edit., on the principle that the executors could not reach them without digging and breaking the soil. But Lord Coke says, that if the tenant plant roots, his executors shall have that year's crop: *Co. Lit.* 55, *b*.: and probably at this day it would be so holden. See 2 Black. Comm. 123.

(*r*) *Ante*, p. 620.

(*s*) *Gilb. Ev.* 210. 2 Black. Comm. 123.

(*t*) *Co. Lit.* 55 *b*.

(*u*) *Penton v. Robart*, 2 East, 50,

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Ch. II. § II.] *In Chattels Vegetable—Emblements.*

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The growing crop of grass, even if sown from seed, and ^{grass :}
though ready to be cut for hay, cannot be taken as emble-
ments; because, as it is said, the improvement is not dis-
tinguishable from what is natural product, although it may
be increased by cultivation (x). It seems, however, that the ^{artificial}
artificial grasses, such as clover, saint-foin, and the like, by ^{grasses :}
reason of the greater care and labour necessary for their
production, are within the rule of emblements (y).

But the doctrine of emblements extends to a ^{second year's}
species only which ordinarily repays the labour, by which ^{crops.}
it is produced, within the year in which that labour is
bestowed, though the crop may in extraordinary seasons be
delayed beyond that period (z). In *Graves v. Weld* (v), the
tenant for a term determinable upon a life sowed the land
in spring, first with barley and soon after with clover: The
life expired in the following summer: In the autumn the
tenant mowed the barley, together with a little of the
clover plant, which had sprung up: The clover so taken
made the barley-straw more valuable, by being mixed with
it: but the increase of the value did not compensate for the

in Lord Kenyon's judgment: *Lee*
v. Risdon, 7 Taunt. 191, in the
judgment of Gibbs, C. J.: and see
the remark of Lawrence, J., in
3 East, 44, note (c). But where a
tenant, not being a nurseryman
by trade, makes a nursery for
fruit trees, for the purpose of trans-
planting to the orchards, he has no
right to sell them: by Heath, J.,
in *Wyndham v. Way*, 4 Taunt.
316. Lord Ellenborough held at
Nisi Prius, that it was waste for an
outgoing tenant of garden ground
to plough up strawberry beds in
full bearing, although when he
came in he paid for them at a
valuation: *Wetherell v. Howells*,
1 Campb. 227. And it was held
in *Empson v. Soden*, 4 B. & Adol.

655, that a tenant (not a gardener
by trade) cannot remove a border
of box planted by himself on the
demised premises: And in this
case *Littledale, J.*, denied that the
tenant could remove flowers which
he had planted.

(x) *Gilb. Ev.* 215, 216. See
also *Evans v. Roberts*, 5 B. & C.
829, 832, in the judgment of
Bayley, J.

(y) 4 Burn, E. L. 299. No case
seems to have occurred where these
matters have come in question.
The general right seems to have
been admitted in *Graves v. Weld*,
ubi supra.

(z) *Graves v. Weld*, 5 B. & Adol.
105, 118.

(a) 5 B. & Adol. 105.

expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown: The reversioner came into possession in the winter, and took two crops of the same clover, after more than a year had elapsed from the sowing: It was held that the tenant was not entitled to emblements of either of these two crops: first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the *cesser* of his interest, this had been already taken by him at the time of cutting the barley.

In what cases
the executor is
entitled to
emblements:

as against the
heir:

It remains to consider in what cases the executor or administrator is entitled to emblements. Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir (*b*): though not as against a dowress (*c*). So if the deceased was seised in fee tail, his executor or administrator is entitled to the privilege as against the heir in tail (*d*). But where a man is seised of the soil as joint-tenant, and dies, the corn, &c., sown, goes to the survivor, and the moiety shall not go to the executors or administrators of the deceased (*e*): Yet if a joint-tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his executors shall have the emblements (*f*).

It must be observed, however, that if a man seised in fee sows the land and then conveys it away, and dies before severance, the crops will not go to the executor of him who has conveyed away the land, but will pass with the soil as appertaining to it (*g*).

(*b*) *Lawton v. Lawton*, 3 Atk. 16.

(*c*) See *post*, pp. 630, 631.

(*d*) Wentw. Off. Ex. 145, 14th edit.

(*e*) The reason for this is that joint-tenants are supposed to covey on the cultivation of the soil by a

joint stock, and in all joint stock, except merchants', there is a survivorship: Gilb. Ev. 212, 213: but see *ante*, pp. 570, *et seq.*

(*f*) *James v. Portman*, Owen, 102.

(*g*) Gilb. Ev. 214.

farmer would not the year in which possession in the clover, after more : It was held that of either of these be claimed only in says the labour by which that labour ven if the plaintiff ble growing at the been already taken

s the executor or Where the deceased personal represen- against the heir (b): So if the deceased nistrator is entitled (d). But where a and dies, the corn, moiety shall not go deceased (c): Yet n shall occupy and fore severance, his

man seised in fee y, and dies before executor of him who pass with the soil

and in all joint stock, chants', there is a sur- Gilb. Ev. 212, 213: pp. 570, *et seq.* v. Portman, Owen, Ec. 214.

In like manner, the executor of a tenant in fee does not enjoy the right to emblements as against a devisee; for if the land itself is devised, the growing crops pass to the devisee, and the executor is excluded (h). And though the devise was made before sowing, and the deviser afterwards sows, and dies before severance, the devisee shall have them, and not the executor (i). So, if the testator, being seised in fee, sows the land, and devises it to A. for life, (without any remainders over,) and the testator and A. both die before severance, the executors of A. shall have the crop, though A. did not sow (k). This rule is founded upon a presumption that it is the will of the testator, that he who takes the land should take the crops which belong to it; because every man's donation shall be taken most strongly against himself (l).

However, this distinction between the heir and devisee, though fully established, is mentioned by Lord Ellenborough, in *West v. Moore* (m), as capricious enough. And the presumption may be rebutted by words in the Will, that show an intent that the executor shall have the emblements (n). Thus where the testator devised certain estates to A. in fee, and to his executors all his money, &c., stock upon his farm, with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust, to pay debts and legacies, &c., it was held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid (o). So where

as against a devisee:

(h) *Cooper v. Woolfitt*, 2 H. & N. 122.

(i) *Com. Dig. Biens* (G. 2).

(k) *Spencer's case*, *Winch.* 51. *Co. Lit.* 55, *b.* note (2), from *Hal. MSS.*

(l) *Gilb. Ev.* 214. On the same ground, if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and

dies before the severance, the wife shall have the corn, and not the executors of the husband: for this is a disposition of the corn, being appurtenant to the land: 1 *Roll. Abr.* 727, pl. 18. *Gilb. Ev.* 214.

(m) 8 *East*, 339, 343.

(n) 8 *East*, 343, by Lord Ellenborough.

(o) *West v. Moore*, 8 *East*, 339.

there is expressly a legatee of the growing crops, or any specific bequest in the Will which can apply to emblements, they will vest in the executor, and after his assent, in the specific legatee (*p*).

Right of
executor of
tenant for life
to emblements.

The privilege of taking the emblements is by no means confined to the case of the representatives of a person seised of the inheritance, as against the heir; but the rule is general, that every one who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his executor or administrator (*q*). Therefore, the executor or administrator of a tenant for life is entitled to emblements to the exclusion of the remainder-man or reversioner: because in this case the estate of the tenant is determined by the act of God (*r*). So if tenant for years, si

Cox *v.* Godsalue, 6 East, 604, note. Blake *v.* Gibbs, 5 Russ. 13, *in notis*. Rudge *v.* Winnall, 12 Beav. 357. *Re* Roose, 17 C. D. 696. See also Godolphin, Pt. 3, c. 21, s. 14, that by a bequest of "Moveables" the industrial fruits of the ground will pass. But in Vaisey *v.* Reynolds, 5 Russ. 12, Sir John Leach, M. R., held that a gift of "all farming stock" will not pass crops on the ground as between a particular and residuary legatee, and that learned Judge observed that in Cox *v.* Godsalue and West *v.* Moore, the devisee was excluded rather because the executor was plainly meant to take the whole personal estate than from the mere force of the words "stock on my farm." This case has, however, been lately fully discussed by Sir George Jessel, M. R., in his judgment in *Re* Roose, *ubi sup.*, and disapproved by him. After citing the older cases he comments upon the distinction drawn by Sir J. Leach between Vaisey *v.* Reynolds

and those older cases and says: "All I can say is, having read the 'case before Lord Ellenborough' (West *v.* Moore), 'I think Sir John Leach made a mistake. 'Lord Ellenborough says 'stock upon my farm' in so many 'words passes the growing crops, 'showing that those were the 'words he relied upon. I am, 'therefore, of opinion that the 'distinction taken by Sir John 'Leach between those two cases' (West *v.* Moore and Cox *v.* Godsalue), 'and the case before him' (Vaisey *v.* Reynolds), 'is quite 'untenable."

(*p*) Cox *v.* Godsalue, 6 East, 604, note to Crosby *v.* Wadsworth.

(*q*) Com. Dig. Biens (G. 2).

(*r*) Co. Lit. 55, b. Where the landlord is tenant for life, and by his death the estate of his tenant at rack-rent is determined, it is enacted by stat. 14 & 15 Vict. c. 25, s. 1, that "instead of claims 'to emblements, the tenant shall 'continue to hold till the end of

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tamdiu vixerit, sows, and dies before severance, his executor shall have the corn, for the uncertainty of the determination of his estate (s).

But there may be a case where the executor of the tenant for life has no right to emblements, on account of the deceased not having been the actual party who sowed the land, and the consequent failure of the reason upon which the right is founded. Thus if A., seised of land, sows it and then conveys it or devises it to B. for life, remainder to C. for life, and B. dies before the corn is reaped, in this case B.'s executors shall not have the emblements, but they shall go with the land to C. (t). And if A. seised in fee, sows land and conveys it to B. for life, remainder to C. for life, and both B. and C. die before severance, the crop shall not go to the executors of either B. or C., but revert to A. (u).

"the then current year, and the new owner of the land shall be entitled to a proportion of the rent." Where H. held, as tenant from year to year, of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, and partly sown with corn and planted with potatoes, and A. died in the middle of a year of H.'s tenancy, and M. thereupon became entitled to the reversion; and at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since the death of A., it was held that the Act applied to all tenancies in respect of which there might be a claim to emblements; that, but for the Act, there might have been a substantial claim to emblements here, and that the premises were, therefore, "a farm or lands" within section 1; and it was also held that that section gave a right to distrain

for the rent, as well as to recover it by action: *Haines v. Welch*, L. R., 4 C. P. 91.

(s) 1 Roll. Abr. Emblements (A.) pl. 12, p. 727.

(t) *Grantham v. Hawley*, Hob. 135. So if a man sows land and lets it for life, and the lessee for life dies before the corn is severed, his executor shall not have it, but he in reversion. So if tenant for life sows the land, and grants over his estate, and the grantee dies before the corn is severed, his executor shall not have it: by *Popham and Gawdy*, Justices in *Kneve v. Pool*, Cro. Eliz. 464. But if the devise be to B. for life, without remainders over, and B. dies before severance, the executor of B. shall have the corn, though B. did not sow: *Winch*, 51 Co. Litt. 55, b. note (2), from Hal. MSS. *Ante*, p. 627.

(u) *Hobart*, 132, in *margin*. *Gilb. Ev.* 215. but see the preceding note.

Right of
executors of
clergy to
emblems of
the glebe.

If a disseisor sow the land of tenant for life, and the tenant for life die, the executors of the tenant for life shall have the corn, and not the disseisor, nor he in reversion (x).

The executors or administrators of the incumbent of a benefice would probably at common law be entitled to the emblems of the glebe lands; for the deceased had an uncertain interest in the land, which was determined by the act of God. The right, however, is fully established by the statute 28 Hen. VIII. c. 11, which provides and enacts, that in case any incumbent happens to die, and before his death hath caused any of his glebe lands to be manured and sown at his own proper costs and charges with any corn or grain, that then in that case every such incumbent may make his testament of all the profits of the corn growing upon the said glebe so manured and sown (y).

If the successor be inducted before the severance of the emblems from the ground, the successor shall have the tithe thereof; for although the executor represents the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted (z): Otherwise, if the parson dies after severance from the ground, and before the corn is carried off (a).

Dowress and
her executors,
when entitled
to emblems.

If the husband sows the ground, and dies, and the heir assigns the land sown to the wife for her dower, she shall have the crop, and not the executors of the husband: for she shall be in *de optimâ possessione viri*, above the title of the executor (b). It was with reference to this especial privilege of a dowress, that at common law she could not,

(x) *Knevett v. Pool, Gouldsb.* 146, by Popham and Fenner.

(y) This statute has been repealed but the repeal probably does not affect the rights of the representative of an incumbent. A person who resigns his living is not entitled to emblems: *Bulwer v. Bulwer*, 2 B. & A. 470. The general rule of law is, that the tenant shall not have emblems when the tenancy is determined

by his own act; as where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeitures, condition broken, &c.: *Com. Dig. Biens* (G. 2). *Davis v. Eyton*, 7 Bingh. 154.

(z) 1 Roll. Abr. 655.

(a) *Wats. C. L.* 513, 4th edit. 3 Burn, El. 415, 8th edition.

(b) 2 Inst. 81.

life, and the tenant
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Biens (G. 2). Davis r.
gh. 154.

Afr. 655.
C. L. 513, 4th edit.
415, 8th edition.
81.

Ch. II. § II.] *In Chattels Vegetable—Emblements.*

631

according to the more general opinion, devise corn which
she herself had sown, nor did it go to her executors or
administrators (c): but by the statute of Merton, 20 Hen.
III. c. 2, the representatives of a tenant in dower, like those
of any other tenant for life, are entitled to emblements (d).

If tenant in dower sows the land, and takes husband, who
dies before severance of the corn, the dowress shall have the
crops, and not the executor of the husband.

Executor of a
husband of
dowress.

With respect to the executor of a man seised in right of his
wife, the rule is, that if he sow and die before severance, his
executors shall have the emblements (e). And if husband
and wife are joint tenants for life, and the husband sows, and
the land survives to the wife, it is also said that she shall
have the corn (f).

Executor of a
man seised in
right of his
wife.

Executor of
husband when
husband and
wife are joint
tenants.

The executor or administrator of a jointress, like a tenant
in dower, is entitled to emblements of the estate settled in
jointure; but she is not entitled to them at her husband's
death to the exclusion of her husband's executors, as a
dowress is (g).

Right of
executor of a
jointress to
emblements.

Upon the death of a tenant by the curtesy, like any other
tenant for life, the emblements of the estate held by the
curtesy will go to his executors or administrators (h).

Right of
executors of
tenant by the
curtesy.

A tenancy at will (in the strict sense of the expression) is

Right of
executor of

(c) Bract. lib. 2, fol. 96. 2 Inst.
81.

(d) See Com. Dig. Biens (G. 2),
that the statute was only in affirm-
ance of the common law. If two
be tenants in common of land in
fee, and one of them takes a wife,
and dies, and the wife is endowed,
&c., and she and the other tenant
in common sow the land, &c.,
and afterwards she makes her
executors, and dies, the corn not
being severed, now her executors
shall have the corn in common
with him who held in common
with the tenant in dower: Perk.
a. 523

s. 6, pl. 11, 253, 7th edition. All
questions, however, of the right of
the executor of a husband to the
emblements of his wife's land are
comparatively unimportant since
the passing of the Married
Women's Property Act, 1882: for
since that Act a husband can in
no case be entitled in right of his
wife except where the marriage
took place and the title to the
property accrued before Jan. 1st,
1883.

(f) Co. Litt. 55, b.

(g) Fisher v. Forbes, 9 Vin. Abr.
tit. Emblements, pl. 82, p. 373.

(h) 1 Roper, Husband and Wife,
35, 2nd edit.

(e) Co. Lit. 55, b. Swinb. Pt. 3,

tenant at will
to emblements.

Entry, egress,
and regress,
to take the
emblements.

Right of
executors of
tenant for life
to charge
holding with
compensation
paid under
46 & 47 Vict.
c. 61, s. 29.

determined by the death of the lessee, and his executor or administrator will be entitled to emblements (i).

When there is a right to emblements, the law gives a free entry, egress, and regress, as much as is necessary, in order to cut and carry them away (k). But the emblements do not give a title to exclusive occupation; and it is doubted in Plowden's queries (l), whether the executors of a lessee for life shall not pay rent for the land till the corn is ripe: though, perhaps, says that author, the executors of tenant in fee simple shall have the corn without paying for it.

Under the Agricultural Holdings Act, 1883, the executors of a landlord tenant for life, who have been compelled under the Act to pay compensation for improvements to an outgoing tenant who had claimed compensation, and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid (ll).

SECTION III.

Of the Estate of an Executor or Administrator in Chattels Personal Inanimate.

As to chattels personal inanimate: All these pass to the executor and administrator: and although any one of them should be specifically bequeathed to a legatee, it will not vest in him till the executor has assented.

What chattels
personal
inanimate do
not pass to the
executor.

It is necessary to attend to three instances in which the right of the executor or administrator to the chattels personal inanimate of the deceased is barred, to some extent, in favour of certain special claimants: 1. Heir-looms, and things in the nature thereof, in respect of the heir or successor. 2. Fixtures, in respect of the heir or devisee, or in respect of the remainder-man or reversioner. 3. Paraphernalia and the like, in respect of the widow.

(i) Co. Lit. 55, b.

(k) Co. Lit. 56, a. See Hayling v. Okey, 8 Exch. 531, 545.

(l) 239th Query.

(ll) Gough v. Gough [1891], 2 Q. B. 665.

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Query.

v. Gough [1891], 2

1. Heir-loom and things in the nature thereof.

It is proposed to consider, 1, Heir-loom and things of 1. Heir looms :
the same nature, from which the executor or administrator
is excluded in favour of the heir or successor. Heir-loom
are such goods and personal chattels as shall go by *special*
custom to the heir along with the inheritance, and not to
the executor or administrator of the last proprietor. The
derivation "loom" is of Saxon original, in which language
it signifies a limb or member: so that heir-loom is nothing
else but a limb or member of the inheritance (*m*). An heir-
loom is also called "principalium," a chief or principal, and
"hereditarium" (*n*).

Brooke says (*o*), that heir-loom are those things which
have continually gone with the capital messuage, by *custom*,
which is the best thing of every sort, as of beds, tables, pots,
pans, and such like of dead chattels moveable. And Lord
Coke says (*p*), that heir-loom are due by *custom*, and not by
the common law, and that the heir may have an action for
them at common law, and shall not sue for them in the
Ecclesiastical Court. Also in Spelman's Glossary (*q*), an
heir-loom is defined to be "omne utensile robustius quod
ab ædibus non facile revellitur, ideoque ex more quorundam
locorum ad hæredem transit tanquam membrum hereditatis."
And in Les Termes de la Ley (*r*), (a book of great antiquity
and accuracy) (*s*), an heir-loom is described to be "any piece

what they are
strictly :

(*m*) 2 Black. Comm. 427. But
in Byng v. Byng, 10 H. of L. 171,
Lord Cranworth, on the authority
of Johnson and Webster, said, he
believed the more correct expla-
nation of the word is, that it is an
old Anglo-Saxon word signifying
goods or chattels. According to
either derivation, it must mean
something which, though not by
its own nature heritable, is to have
a heritable character impressed on

it; an interpretation hardly to be
reconciled with an absolute gift to
several persons as joint-tenants :
10 H. of L. 183.

(*n*) Bro. Discent. pl. 43. Co. Lit.
18, *b*.

(*o*) Discent. pl. 43.

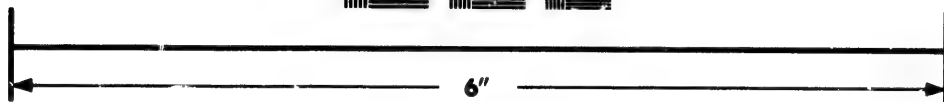
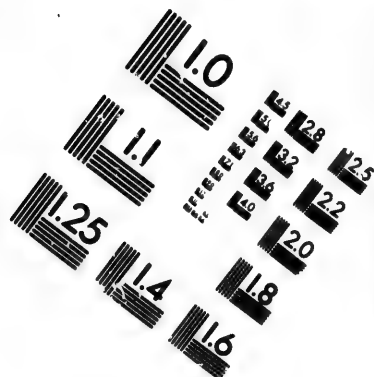
(*p*) Co. Lit. 18, *b*.

(*q*) Voce, Heir-loom.

(*r*) See Treat. on Fixtures, 162.

(*s*) Per Bayley, J., in Hewlins
v. Shippam, 5 B. & C. 229.





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must go to
the heir by
custom :

semble, must
be of a pon-
derous nature.

Crown jewels.

Heir-looms are
not devisable :

of household stuff (*ascun parcel des utensils d'un meuse*), which, by the custom of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner) unto the heir and not to the executors." Hence it seems to follow, that an heir-loom, in the strict sense of the word, can only go to the heir by force of a custom, and that in its nature it is a chattel distinct from the freehold. Yet Blackstone (t) says that heir-looms are "generally such things as cannot be taken away without damaging or dismembering the freehold;" and Lord Holt is reported to have said at *Nisi Prius*, that goods in gross cannot be an heir-loom, but they must be things fixed to the freehold, as old tables, benches, &c. (u); which proposition is not only adverse to the authorities above cited, with regard to an heir-loom being a detached chattel, but is also liable to the objection that the heir would not then take it by custom, but as a thing annexed to the freehold at common law. Moreover, in the report of *Lord Petre v. Heneage*, by Lord Raymond (x), Lord Holt merely says, "a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, &c." (y), which agrees with the above definition by Spelman, "*omne utensile robustius*."

The custom which entitles the heir must be strictly proved (z).

The ancient jewels of the Crown are heir-looms, and shall descend to the next successor (a).

If a man, says Lord Coke (b), be seised of a house, and possessed of divers heir-looms that, by custom have gone with the house from heir to heir, and by his Will deviseth away the heir-looms, this devise is void; for Littleton says,

(t) 2 Comm. 427.

(u) Lord Petre v. Heneage, 12 Mod. 520.

(x) Vol. i. p. 728.

(y) And Blackstone, in an earlier part of his Commentaries, vol. ii. p. 17, says, "an heir-loom or im-

plement of furniture, which by custom descends to the heir together with a house, is neither land nor tenements, but a mere moveable."

(z) 2 Black. Comm. 428.

(a) Co. Lit. 18, b.

(b) Co. Lit. 185, b.

ansils d'un meuse,) having belonged to the house (after the death of the testator) to the executors." In the strict sense, the heir takes the realty by force of a will, and the chattels distinct from the realty, which the husband from the wife, any more than heir-looms from the wife" (e). Yet, during his life, the owner may sell or dispose of them, as he may of the timber of the estate (f). Besides heir-looms, properly so called, there are other instances of inanimate personal chattels, which the law gives to the heir, as part of his inheritance, and which may be considered as chattels in the nature of heir-looms. Thus monuments, coat-armour, the sword, pennons, and other ensigns of honour set up in memory of the deceased, shall go to the heir of the deceased, as heir-looms in the manner of an inheritance (g); and it matters not that they are annexed to the freehold, albeit that is in the parson (h). But the property of the shroud and coffin remains in the executors or other person who was at the charge of the funeral: and it may be laid to be theirs, in an indictment for stealing them (i).

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heir-looms, and shall

ised of a house, and by custom have gone by his Will devised to him; for Littleton says,

f furniture, which by custom goes to the heir together with the house, is neither land nor chattel, but a mere moveable." Black. Comm. 428.

Lit. 18, b.
Lit. 185, b.

"the Will takes effect after his death, and by his death the heir-looms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise." And Lord Coke, in another place observes, that the ancient jewels of the Crown, being heir-looms, are not devisable by testament (c). So Lord Macclesfield in *Tipping v. Tipping* (d), said, "I take it, *bona paraphernalia* are not devisable by the husband from the wife, any more than heir-looms from the wife" (e). Yet, during his life, the owner may sell or dispose of them, as he may of the timber of the estate (f).

Besides heir-looms, properly so called, there are other instances of inanimate personal chattels, which the law gives to the heir, as part of his inheritance, and which may be considered as chattels in the nature of heir-looms. Thus monuments, coat-armour, the sword, pennons, and other ensigns of honour set up in memory of the deceased, shall go to the heir of the deceased, as heir-looms in the manner of an inheritance (g); and it matters not that they are annexed to the freehold, albeit that is in the parson (h). But the property of the shroud and coffin remains in the executors or other person who was at the charge of the funeral: and it may be laid to be theirs, in an indictment for stealing them (i).

but are alienable by the ancestor in his lifetime.

Chattels in the nature of heir-looms:

monuments, coat-armour, &c., set up in honour of deceased:

coffin and shroud:

(c) Co. Lit. 18, b.

(d) 1 P. Wms. 730.

(e) See also to the same effect, 2 Black. Comm. 420. Com. Dig. Biens (B.).

(f) 2 Black. Comm. 429. So the king may dispose of the ancient crown jewels by patent: Lord Hastings v. Sir Archibald Douglas, Cro. Car. 344, by Berkeley and Jones.

(g) Curven's case, 12 Co. 105. See Stubs v. Stubs, 1 Hurlst. & C. 237, as to the heir's right to a grant of arms from the Herald's College.

(h) Co. Lit. 18, b. 1 Gibs. Cod. 544. 2 Black. Comm. 429.

(i) 2 Russell on Crimes, 5th edit. 256. If the executor lays a grave-stone on the testator in the church, and sets up coat-armour, and the vicar or parson removes them, or carries them away, an action on the case lies for either the executor or the heir: Godb. 200, by Coke: i.e. (*semita*) if they were originally set up with a faculty: Senger v. Bowle, 1 Add. 541: and see Spooner v. Brewster, 3 Bingh. 136.

Collar of S. S.
and garter.

So though a testator devise all his jewels, &c., to his wife, yet his garter and collar of S. S. shall go to his heir, in the way of heir-looms (*k*). So where land is held by the tenure of cornage, an ancient horn may go along with the inheritance, as an heir-loom (*l*).

ancient horn :

Journals of the
House of
Lords :

In the case of *Upton v. Lord Ferrers* (*m*), a question was raised, whether the executor, or the heir-at-law of a peer of Parliament having succeeded to the peerage, was entitled to the Journals of the House of Lords, which are delivered to peers ; The Master of the Rolls (Sir R. P. Arden) did not determine the point ; but intimated an opinion that the heir-at-law was entitled, observing, that a bishop gives a receipt for the journals of his see : and upon the death of a peer, the subsequent volumes only are delivered to the next lord.

Charters and
deeds belong-
ing to the in-
heritance, go
to the heir,
and not to the
executor ;

Charters or deeds relating to the inheritance, are considered so much to savour of the realty, that the law for some purposes does not account them to be chattels (*n*), but provides, that they shall follow the land to which they relate, and shall vest in the heir, as incident to the estate, to the exclusion of the executor or administrator (*o*). So far has the doctrine of charters and other written assurances concerning the realty not being chattels been carried, that larceny could not have been committed of them at common law, the taking of them being considered (as of other things which were part of the freehold), merely as a trespass and not a felony (*p*). The very box or chest which has usually been employed for keeping them partakes of their nature, and goes

so of the box
in which they
are kept :

(*k*) Earl of Northumberland's case, Owen, 124.

(*l*) Pusey v. Pusey, 1 Vern. 273.

(*m*) 5 Ves. 801.

(*n*) By a grant of *omnia bona et catalla*, charters concerning the land shall not pass : Perk. s. 115. Touchst. 97, 98.

(*o*) Godolph. Pt. 2, c. 14, s. 1. Wentw. Off. Ex. 153, 14th edition. Co. Lit. 6, a, where Lord Coke calls them the *sineus* of the land.

(*p*) 2 Russell on Crimes, 141. But this defect of the common law was remedied by stat. 7 & 8 Geo. IV. c. 29, s. 23, which, however, has been repealed : and now by stat. 24 & 25 Vict. c. 97, s. 28, whoever shall steal or for any fraudulent purpose destroy, cancel, obliterate or conceal the whole or any part of any document of title to lands, shall be guilty of felony : 2 Russell, 5th edit. 220.

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to the heir, and not to the executor (p); and of that also, at
common law, no larceny could have been committed (r).
Some writers have taken a difference, that the executor shall
have the chest unless it be shut or sealed (s). But the weight
of authorities seems against any such distinction, and in
favour of the heir's general right (t).

But this rule applies to those deeds and writings only which
relate to the freehold and inheritance; for such as regard
terms for years, goods, chattels, or debts, belong to the execu-
tor or administrator (u).

Personal property may also be devised or limited in strict
settlement to one for life, with remainder to sons and
daughters in tail, so as to be transmissible like heir-
looms (x). Thus a testator may devise or limit in strict
settlement an estate and capital mansion, together with
personal property, as the plate, pictures, library, furniture,
&c., therein, such plate, &c. to be enjoyed, together with the
house and estate, unalienable by the devisees in succession,
as far as the law will allow. But the chattels, whether
trustees be interposed or not, will be the absolute property
of the first person seised in tail, and on his death devolve on
his executors or administrators; and be conformable to all the
other rules concerning executory devisees, so that the property
cannot be rendered unalienable longer than lives in being and
twenty-one years afterwards (y).

If the chattels, therefore, which are intended to go as

Chattels
settled or
devised as
heir-looms.

(q) Godolph. Pt. 2, c. 14, s. 1.
Wentw. Off. Ex. 156, 14th edit.
Com. Dig. Biens (B.).

(r) An action will, however, lie
at common law for detinue or
trover of title-deeds.

(s) Swinb. Pt. 6, s. 7, pl. 5.

(t) Godolph. Pt. 2, c. 14, s. 1.
Wentw. Off. Ex. 156.

(u) Wentw. Off. Ex. 153, 14th
edit. Bac. Abr. tit. Exors. (H. 3).

If the writings of an estate are

pawned or pledged for money, they
are considered as chattels in the
hands of the creditor, and in case
of his decease, they will go to his
personal representatives as the
party entitled to the benefit accru-
ing from the loan: Touchst. 469.

(x) Co. Lit. 18, b, note (109), by
Hargrave

(y) Ibid. Carr v. Lord Errol,
14 Ves. 478.

heir-looms, are merely subject to the same limitations as the real estate limited in strict settlement, they will vest absolutely in the first tenant in tail, though he should die within an hour after his birth, and will go to his personal representative: Hence as the real estate in that event passes over to the next remainder-man, a separation between the two properties ensues. It has been a subject of much discussion whether this will be obviated by a mere direction that the chattels shall go together with the land, "for so long a time as the rules of law and equity will permit." But the point, it should seem, must now be considered as settled, that this must be treated as a direct and not as an executory gift, and that, consequently, the absolute interest in the chattels will nevertheless vest in the first tenant in tail (z). And accordingly in the case of *Rowland v. Morgan* (a), it was ruled by Sir James Wigram, V.-C., and afterwards Lord Cottenham, C., on appeal, that a direction annexed to a bequest of chattels, that they shall go as heir-looms, although accompanied by a direction to the executors to make an inventory of them, does not render such bequest executory, or give to a Court of Equity any power to modify the legal effect of the bequest. In order, therefore, to prevent the separation, it is usual, after subjecting the chattels to the same limitations as the freehold which they are to accompany as heir-looms, to add a declaration, that they shall not vest absolutely in the tenant in tail by purchase until twenty-one, or death under that age, leaving issue inheritable under the entail (b).

(z) *Searsdale v. Curzon*, 1 John. & Hem. 40. *Harrington v. Harrington*, L. R., 3 Ch. 564; L. R., 5 H. L. 87. *Christie v. Gosling*, L. R., 1 H. L. 279. *Holmesdale v. West*, L. R., 3 Eq. 474. *Holloway v. Webber*, L. R., 6 Eq. 523. *Shelley v. Shelley*, L. R., 6 Eq. 540. *Re Exmouth*, 23 C. D. 158. *Re Creswell*, 24 C. D. 102. *Re Johnston*, 26 C. D. 538. *Re Cornwallis*, 32

C. D. 388. In the case of *Shelley v. Shelley*, *ubi sup.*, it was held by Wood, V.-C., that the objection, in any, to limiting personal estate as heir-looms where there is no real estate to guide the limitations does not apply to the case of family jewels.

(a) 6 Hare, 463.

(b) 2 Jarman on Wills, 548, 3rd edit. *Boydell v. Golightly*, 1

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oydell v. Golightly, 1

Lord Eldon, in *Clarke v. Lord Ormonde* (c), said that heir-
looms are a kind of property that are rather favourites of
the Court:—and that, although no testator can in any way
exempt any part of his personal estate from applicability to
the payment of his debts, nor can he put into the hands of
his executors the means of defending themselves at law;
yet where a testator makes a will, providing that certain
portions of his effects shall be treated as heir-looms, it is the
duty of the executors, as far as possible, to preserve those
parts of his property, and unless compelled, they ought not to
apply them to the payment of debts (d).

In the case of a corporation sole, as a bishop or parson,
the general rule is, that chattels cannot go in succession:
and there has already been occasion to point out a strong
instance of this doctrine, viz., that though a lease for years
be made to a bishop and his successors, yet it will go to his
executors (e). But there are some exceptions (not only in
cases of choses in action, which will hereafter be examined,
but) in cases of chattels personal, which shall go to the suc-
cessor of a corporation sole in the manner of heir-looms.
Thus it has been held, that the ornaments of the chapel of
a preceding bishop belong to the succeeding bishop, and are
merely in succession (f). So if an incumbent enter upon
a parsonage-house in which are hangings, grates, iron backs
to chimneys, and such like, not put up there by the last in-
cumbent, but which have gone from successor to successor,
the executor of the last incumbent shall not have them, but
they shall continue in the nature of heir-looms; but if the
last incumbent fixed them there only for his own conveni-

Executors
ought not to
apply them
unnecessarily
to the payment
of debts.

Chattels which
go to the suc-
cessor of a cor-
poration sole
in the manner
of heir-looms.

Sim. 346, per Shadwell, V.-C. See
also Potts v. Potts, 1 H. of L. 671,
for an example of a limitation of
chattels under which they do not
vest in the tenant in tail on his
birth. See further the observa-
tions of Wood, V.-C., on this case
in his judgment in Lord Scarsdale

v. Curzon (ubi supra), where all
the previous cases are fully and
most ably reviewed.

(c) 1 Jacob, 114, 115.

(d) 1 Jacob, 108.

(e) Ante, p. 597.

(f) Corven's case, 12 Co. 105,
106.

ence, it seems they shall be deemed as furniture, or household goods, and shall go to his executor (*g*).

2. Fixtures.

Fixtures.

General rule,
*quicquid plan-
tatur solo, solo
cedit.*

What is an
annexation of
a chattel to
the freehold :

II. Fixtures, from which the executor or administrator is excluded in respect of the heir or devisee, or in respect of the remainder-man or reversioner. When personal inanimate chattels are affixed to the freehold, they are usually denominated fixtures (*h*) ; and the questions concerning them, which form the present subject of inquiry, have arisen in the nature of exception to the general rule of law with regard to chattels in their condition, *viz.*, *quicquid plantatur solo, solo cedit, i.e.*, whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties (*i*).

It will perhaps be convenient to consider in the first place, what is such an annexation to the freehold as will bring a chattel within the general rule : and then to proceed to inquire, in what cases the rule is relaxed with respect to an executor or administrator.—In order to constitute such an annexation it is necessary that the article should be let into or united to the land, or to substances previously connected

(*g*) 4 Burn, E. L. 304, 8th edit.

(*h*) The word "fixture" is here used to convey the idea simply of annexation to the freehold : which sense of the term is the most easy of adaptation to the present Treatise. For general purposes, the definition given in the work of Messrs. Amos and Ferard (3rd edit. by Ferard & Roberts, p. 2) is certainly the most convenient and scientific, *viz.*, "fixtures are those personal chattels which have been annexed to land and which may be afterwards severed and removed by the party who has annexed

them against the will of the owner of the freehold." The general question of the origin and extent of the doctrine of "Fixtures" was fully discussed in the case of *Bishop v. Elliott*, 10 Exch. 496, S. C. in Cam. Scacc. 11 Exch. 119.

(*i*) See the judgment of Lord Hardwicke, C., in *Dudley v. Warde*, Amb. 113, and of Lord Ellenborough, in *Elwes v. M^r. 3 East*, 51. S. C. 2 Smith's Leading Cases. This rule is always open to variation by agreement of parties : *Wood v. Hewett*, 8 Q. B. 913.

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therewith. It is not enough that it has been laid upon the land, and brought into contact with it: The rule requires something more than mere juxta-position; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (*k*). As an illustration may be mentioned the case of *Culling v. Tuffnall* (*l*) before Treby, C.J., at Nisi Prius, where it was holden that the tenant, who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not *fixed it in or to the ground*, might take it away at the end of his term (*m*). On the other hand, where the tenant had erected a verandah, the lower part of which was attached to posts which were fixed in the ground, Abbot, J., held that the tenant could not remove any part of it (*n*). In the case of *R. v. Londonthorpe* (*o*), where a tenant had built on part of the land a post windmill constructed upon cross traces, laid upon brick pillars, but not attached or affixed thereto; the Court held, that the windmill was a mere chattel, and not to be considered as connected with the land (*p*). And generally, where the buildings are

(*k*) *Amos & Ferard on Fixtures*, 3rd edit. p. 3. *Wilde v. Waters*, 16 C. B. 637.

(*l*) Bull. N. P. 34.

(*m*) In *Buller*, it is said to have been holden, that he might do so by the custom of the country; but Lord Ellenborough, in adverting to the case (in *Elwes v. Maw*, 3 East, 55), observes, that the tenant might have done so without any custom; for the terms of the statement exclude the things from being considered as fixtures.

(*n*) *Perry v. Brown*, 2 Stark. N. P. C. 403. In this case the tenant had covenanted to repair and keep in repair the premises, and all the erections, buildings, and improve-

ments, which might be erected thereon during the terms and yield up the same in good and sufficient repair.

(*o*) 6 T. R. 377.

(*p*) So in *R. v. Otley*, Suffolk, 1 B. & A. 161, a pauper rented a windmill, and a brickbuilt cottage and garden, at the rent of 30*l.* per annum for six years, and during that time held and occupied the same, and actually paid that rent, and was rated to and paid the rates for the relief of the poor: The cottage and garden, with the mill, were together of more than the annual value of 10*l.*, but exclusive of the mill, they were not of that annual value: The mill was

not let into the soil, but merely rest upon blocks or pattens, they continue mere chattels (*q*). It is obvious that, in similar cases, where it is a conclusion of fact that the connection with the soil does not amount to an actual annexation, the property continues in every respect a mere chattel, and will pass as such to the executors and administrators.

Moreover, the object and purpose of the annexation must be regarded: For if a chattel be fixed to a building, merely for the more complete enjoyment and use of it *as a chattel*, it still, it should seem, remains a chattel, notwithstanding it is annexed to the freehold; and is never a part of it, any more than a carpet which is attached to the floor by nails for the purpose of keeping it stretched out: And on this principle, it was held, that cotton spinning machines, screwed into, and fixed firmly to, the floor, were chattels and dis-
trainable for rent (*r*).

constructive
annexation.

But there may be a sort of constructive annexation of a chattel not actually affixed to the freehold: as if a man has a mill, and the miller takes a stone out of the mill, to the

of wood, and had a foundation of brick; but the wood-work was not inserted in the brick-foundation, but rested upon it by its own weight alone: No part of the machinery of the mill touched the ground or any part of the foundation: It was held that the wind-mill, not being affixed to the freehold, nor to anything connected with it, was not parcel of a tenement, and, consequently, that the pauper gained no settlement. Again in *Wansbrough v. Maton*, 4 A. & E. 884, it was held that a tenant was entitled, at the expiration of his term, to remove a barn which he had erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by its

weight alone; and that he might maintain trover for such a barn. See also *Wiltshire v. Cottrell*, 1 E. & B. 674.

(*g*) *Naylor v. Collinge*, 1 Taunt. 21.

(*r*) *Hellawell v. Eastwood*, 6 Exch. 295. *Elliott v. Bishop*, 10 Exch. 508, 520. For cases in which chattels annexed to the freehold passed with the freehold, see *Longbottom v. Berry*, L. R., 5 Q. B. 123. *Turner v. Cameron*, L. R., 5 Q. B. 306. *Mather v. Fraser*, 2 Kay & J. 549. *Walmsley v. Milne*, 7 C. B., N. S. 115. *Climie v. Wood*, L. R., 4 Ex. 328. *Ex parte Astbury*, L. R., 4 Ch. 630. *Sheffield & South Yorkshire Permanent Benefit Building Society v. Harrison*, 15 Q. B. D. 358.

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intent to pick it, to grind the better; although it is actually severed from the mill, yet it remains parcel of the mill, and will go to the heir: The same law of keys, and (in some sort) of doors, windows, rings, &c., which, although they are distinct things, shall go with the inheritance of the house (s). So the sails of a windmill are parcel of the freehold, and shall go to the heir, and not to the executor (t).

It has been laid down, that dung in a heap is a chattel, and goes to the executors; but if it lies scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold (u).

The second branch of the inquiry respecting fixtures remains to be investigated, viz., when chattels personal have been affixed to the freehold, and have thus lost their chattel character, under what circumstances the executor or administrator of the person who affixed them is entitled to sever them, and reduce them again to a state of personality, so as to form part of the estate of the personal representative.

In what cases executors are entitled to sever fixtures:

1. The subject will first be considered as between the executor or administrator, and the heir of tenant in fee. In this case, the old rule of law above mentioned, "*quicquid plantatur solo, solo cedit*," still obtains with some rigour in favour of the inheritance, and against the right to disannex therefrom, and consider as a personal chattel, any thing which has been affixed thereto; whereas, in the case as between the executors of tenant for life or in tail, and the remainder-man or reversioner, the right to the fixtures is considered more favourably for the executors; and in the case as between landlord and tenant (which, although foreign to this Treatise, it will be necessary in some measure to contemplate) still greater latitude and indulgence has been allowed in favour of the tenant (x). It must, therefore,

1. Right of the executor of tenant in fee to fixtures as against the heir.

(s) Walmsley v. Milne, 7 C. B., N. S. 138, per Crowder, J.

(t) R. v. Crosse, 1 Sid. 207, by Clench and Fenner, Justices.

(u) Yearworth v. Pierce, Aleyn, 32. See Higgon v. Mortimer, 5 C. & P. 616.

(x) Elwes v. Maw, 3 East, 51,

carefully be observed, that an instance of the right allowed to a tenant as against his landlord, is no authority for its allowance to an executor as against the heir, or the remainder-man or reversioner; nor does it follow, because the executor of tenant for life or in tail is entitled to certain fixtures, that the executor of tenant in fee will also be entitled.

Old rule
between the
executor and
heir of tenant
in fee.

The rule as anciently established, between the executor and heir of tenant in fee seems to have had no exceptions; whatever was affixed to the freehold descended to the heir as parcel of the inheritance. "The law is the same," says Godolphin (y), "*concerning all things fastened to the freehold, or to the ground by mortar or stone, as tables, dormants, leads, mangers, millstones, anvils, doors, keys, glass windows, and the like; for none of these be chattels, but parcels of the freehold, and, therefore, belonging to the heir, not the executor.*" So it is said in the Touchstone (z), "*the incidents of a house, as glass windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables, dormants, furnaces of lead and brass, and vats in a brew and dye-house standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (although fastened to no wall), a copper or lead, fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house.*" So it is laid down in Noy's Maxims (a), "*all chattels shall go to the executors as vats and furnaces fixed in a brew-house or dye-house by the lessee; but if they be fixed by tenant in fee, the heir shall have them*" (b).

Relaxations
with respect to

But in modern times some relaxations of the rule have

in Lord Ellenborough's judgment. See also Lord Kenyon's judgment in *Penton v. Robart*, 2 East, 90, 91.

(y) Pt. 2, c. 14, s. 1.

(z) P. 470.

(a) P. 51.

(b) See also Swinb. Pt. 6, s. 7, pl. 5. Wentw. Off. Ex. 149, 150, 151, 14th edit. Herlakenden's case, 4 Co. 64, a.

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obtained; which may be considered, 1st, with respect to fixtures put up by the tenant in fee for the purposes of trade; and 2ndly, with respect to fixtures put up by him for ornament or domestic convenience. As to trade fixtures, the first instance of departure from the old rigour was in the case of a cyder-mill, before C. B. Comyns, at the assizes, at Worcester, where, upon an action of trover brought by the executor against the heir, the cyder-mill, though deep in the ground, and certainly affixed to the freehold, was held to be personal estate, and the jury were directed to find for the executor (c). This, in fact, is the only expressly decided case in favour of the right of the executor of tenant in fee to trade fixtures: although Lord Hardwicke, in *Lawton v. Lawton* (d), alluding to fire-engines set up in a colliery, said, "I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir:" and Lord Ellenborough, in his judgment in *Elwes v. Maw* (e), recognizes the principle of C. B. Comyns's decision. Its authority, however, has been denied in the House of Lords in *Fisher v. Dixon* (f); unless on the supposition that the cyder-mill in question was not annexed to the freehold (which it has always been assumed to have been in all the previous judicial discussions of the case).—The case of *Fisher v. Dixon* has also negatived the doubt suggested by the dictum of Lord Hardwicke above cited: For it was there held by the House of Lords, that machinery affixed to the freehold by the owner in fee of certain land (purchased by himself) consisting of steam-engines, rails, and other fixtures, erected and used by him in the course of trade, for the purpose of working coal and iron mines in the land, went to his heir as part of his real estate. And

executor's
right, as
against the
heir, to trade
fixtures.

(c) *Ex relatione* Wilbraham, in borough in *Elwes v. Maw*, 3 East, 3 Atk. 14, *Lawton v. Lawton*. The decision was recognised by Lord Hardwicke in that case, and in *Lord Dudley v. Lord Warde*, Amb. 114, and by Lord Ellen-

54.
(d) 3 Atk. 15.

(e) 3 East, 54.

(f) 12 Cl. & F. 312, 325, 329, 331.

several learned peers laid down that the principle on which a departure has been made from the old rule in favour of trade has no application to a case between the heir and the executor (g).

This decision is in accordance with that of *Lawton v. Salmon* (h).

In *Trappes v. Harter* (i), the question was, whether the machinery, which was the subject of the action, passed to the mortgagee under a mortgage deed, or vested in the assignees under a commission of bankruptcy: Lord Lyndhurst, C.B., in delivering the judgment of the Court, observed that it was clear, as between landlord and tenant, it might be removed by the tenant, if put there by him: as between heir and executor, it would pass to the executor. His Lordship proceeded to observe, that, applying the authorities of *Lawton v. Lawton* and *Lawton v. Salmon*, to the present case, the Court thought that this machinery, erected for the purposes of trade, in a neighbourhood where machinery of such description was commonly removed, and which was capable of removal without injury to the freehold, was not to be considered as belonging to the inheritance, but as part of the personal estate.

It seems to have been held, that the custom of the country may extend the rights of the executor beyond the rules above stated (k).

Relaxation
with respect to
executor's
right, as
against the
heir, to
fixtures put up
for ornament
or convenience:
furnace:
hangings:

As to the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience, the first infringement of the strict rule in favour of the heir, with respect to fixtures of this sort, appears to be in *Squire v. Mayer*, Trin. Term, 1701, where it was held by Lord Keeper Wright, that a furnace, though fixed to the freehold and purchased with the house, and also the hangings nailed

(g) See *post*, p. 653. *Mather v. Fraser*, 2 K. & J. 536. *Walmsley v. Milne*, 7 C. B., N. S. 115. *Bain v. Brand*, 1 App. Cas. 762.

(h) 1 H. Black. 259, in a note to

Fitzherbert v. Shaw.

(i) 2 Crompt' and Mees. 153.

(k) *Viner's Abr. tit. Executors* (U.), 74. See also *Davis v. Jones*,

2 B. & A. 165.

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165.

to the walls, should go to the executor and not to the heir;
and so determined, says the report, contrary to *Herlakenden's*
Case (l).

The next case on the subject was *Cave v. Cave (m)*, decided pictures
by the same Judge, in Trin. Term. 1705. The Lord Keeper
was there of opinion, that "although pictures and glasses, pier-glasses
generally speaking, are part of the personal estate, yet, if
put up instead of wainscot, or where otherwise wainscot
would have been put, they shall go to the heir: The house
ought not to come to the heir maimed and disfigured: *Her-*
lakenden's Case: Wainscot put up with screws shall remain
with the freehold."

But in *Beck v. Rebow (n)*, determined in the subsequent
year, a bill was filed in Chancery, upon a covenant made by
a testator, to convey a house and all things affixed to the
freehold thereof: The bill alleged that the defendant, the
devisee in trust of the house, had taken away, among other
things, the pier-glasses, hangings, and chimney-glasses, and
it was urged for the plaintiff, that these hangings, pier-
glasses, and chimney-glasses, were as wainscot, being fixed
with nails and screws to the freehold: that there was no
wainscot under them; and as they would have gone to the
heir and not the executor, à fortiori, they would go to the
plaintiff who was as a purchaser of the house; and *Cave v.*
Cave was cited: But Lord Keeper Cowper was of a different
opinion; saying that hangings and looking-glasses were only
matters of ornament and furniture, and not to be taken as
part of the house or freehold (o).

Perhaps a deduction may be made from these cases,
which may reconcile their apparent discrepancies, viz., that,
generally, pictures and looking-glasses shall go to the executor

(l) 2 Eq. Cas. Abr. 430.

(m) 2 Vern. 508.

(n) 1 P. Wms. 94.

(o) In the case of *Birch v. Daw-*
son, 2 Ad. & Ell. 37, looking-
glasses standing on chimney-pieces

and nailed to the wall and a book-
case standing on, but not fastened
to, brackets and screwed to the
wall, passed under a bequest of
"fixtures and fixed furniture."

as personal estate, although strictly speaking, they may be so fixed by nails and screws to the walls as to be attached to the freehold:—but that if they are *let into the wainscot*, so as to take the place of panels of it, they shall go to the heir; because they could not be removed by the executor without disfiguring the house. The true reason, why they have been held to be removable, probably is that, on the principle already stated (*ante*, p. 642), they were never part of the freehold.

ornamental
chimney-
pieces :

Lord Hardwicke in *Lord Dudley v. Lord Warde* (*p*), speaking of marble chimney-pieces, says, that as between landlord and tenant, they are removable by the latter, if erected by him, but this does not hold between the heir and the executor. They are removable, it should seem, not because they are marble, but because they are ornamental (*q*).

tapestry :

The cases of relaxation were followed by *Harvey v. Harvey* (*r*), in which it was held by C. J. Lee, at Nisi Prius, in trover by an executor against the heir, that hangings, tapestry, and iron backs to chimneys, belonged to the executor, who recovered accordingly against the heir.

iron backs to
chimneys :

The inference drawn from these decisions, by a writer of considerable accuracy (*s*), is this : The law seems now to be held not so strict as formerly, and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them : as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise.

tables, ovens,
jacks, clock-
cases.

Contrary dicta
of judges in
recent cases :

On the other hand, the common law Judges have, in several modern instances, incidentally stated the old rule as existing with scarcely any relaxation, between the executor and the heir. Thus, in *Winn v. Ingilby* (*t*), the question was, whether the sheriff had a right to take in execution, under a *feri facias*, some fixtures, in a house which was

(*p*) Ambl. 113.

(*r*) 2 Stra. 1141.

(*q*) Bishop v. Elliott, 11 M. & W. 113.

(*s*) 4 Burn, E. L. 301, 8th edit.

(*t*) 5 B. & A. 625.

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the plaintiff's freehold, consisting of set pots, ovens, and ranges: The Court decided that the sheriff had no right: For these were fixtures which would go to the heir, and not the executor, and they were not liable to be taken as goods and chattels under an execution (u). So in *Colegrave v. Dias Santos* (x), which was trover for articles of three classes; the first admitted to be clearly annexed to the inheritance:—the second, consisting of stoves, cooling coppers, and blinds; and the third, not fixtures at all; Bayley, J., said, "The general rule relating to the right of fixtures, is that between the heir and the executor; and as between them, the second class of articles would belong to the heir." In the same case, Abbott, C.J., said, "The rule of law is most strict between the heir and the executor: According to that rule, the articles in the two first classes would be considered as a parcel of the freehold." And in *The King v. St. Dunstan* (y), where in a settlement case, the question was whether certain fixtures, consisting of a stove, cupboards, and grates, (the stove and grates fixed with brickwork in the chimney places, and the cupboards standing on the ground, and supported by holdfasts, and all removable without doing any injury to the freehold, except leaving a few marks of nails) were parcel of a demised tenement; the Court held that they were, and Bayley, J., said, "Although these fixtures, if they belonged to the tenant, might have been removed by him during the term, yet, as they actually belonged to the landlord, they were parcel of the freehold, and would have gone to his heir, and not to his executor."

From these cases, it should seem, that the law is by no means clearly settled respecting the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience.

2. It is now proper to view the subject of Fixtures as between the executor and the devisee of a tenant in fee.

set pots, ovens,
ranges :

stoves, cooling
coppers,
blinds :

stoves, grates,
cupboards.

2. To what
fixtures an
executor is

(u) See *Mather v. Fraser*, 2 Kay
& J. 550, per Wood, V.-C.

(x) 2 B. & C. 76.
(y) 4 B. & C. 686.

entitled as
against a
devisee of
tenant in fee.

The general rule is, that a devisee shall take the land in the same condition as it would have descended to the heir: and consequently he will be entitled to all articles that are affixed to the land, whether the annexation takes place before, or subsequent to the date of the devise: and as to those fixtures which the executor may claim against the heir, he would be equally entitled against a devisee (z). However, it will be recollected that in the analogous case of Emblements, while the heir is excluded in favour of the executor, the devisee has been held to be entitled to them upon the presumed intention of the testator (a).

There seems no doubt but that if, from the nature or condition of the property devised, it is apparent that the intention was that the fixtures should go along with the freehold to the devisee, they will pass to him, although they are of such a sort that the executor might have been entitled to them as against the heir. Thus, where the devise was of the testator's copyhold estates, which consisted, *inter alia*, of a brew-house and malt-house, let on lease, together with the plant and utensils, it was held that the plant passed with the brew-house, on the ground that the testator intended to devise the plant as well as the shell of the brew-house; that without the plant, the walls would be of no use: and that it was material that the whole was, at the time of making the Will, in lease together (b).

(z) Amos & Ferard on Fixtures, 3rd edit., 323.

(a) See *ante*, p. 627.

(b) Wood v. Gaynon, 1 Amb. 395. In the case of a conveyance of land by way of mortgage, as well as in that of a conveyance of any other description, all things annexed so as to become fixtures pass with the mortgaged premises as part of the mortgage security, and that though the deed contains no mention of fixtures. The Conveyancing and Law of Property

Act, 1881, sect. 6, enacts that a conveyance of land made after the commencement of the Act [1 Jan., 1882], "shall be deemed to include and shall by virtue of the Act operate to convey with the land all . . . fixtures." This was the law as established by decided cases. These cases, which since the above Act have become less material (except as to mortgages executed before 1 Jan., 1882), are set out in the 8th edition of this Work, p. 746, note (i).

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16, note (i).

3. The subject now proceeds to the right to fixtures of the executor of tenant for life or in tail, as against the reversioner or remainder-man : and the division employed in considering the right of the executor of tenant in fee will here be resorted to : *viz.* 1. The claim to fixtures set up by the particular tenant for purposes of trade. 2. The claim to fixtures set up by him for ornament or domestic convenience.

Since the law is more indulgent in this respect to the executor of the particular tenant, than to the executor of the tenant in fee, it is clear that the authorities already mentioned which are in favour of the executor's right as against the heir are equally so in favour of it as against the remainder-man or reversioner. In addition to these, there are cases, with respect to trade fixtures, in which the rights of the personal representatives of the tenant for life or in tail have been expressly considered. In *Lawton v. Lawton* (c), it was held that a fire-engine, set up for the benefit of a colliery, by the tenant for life, should be considered part of his personal estate, and go to his executor for the increase of assets in favour of creditors : And Lord Hardwicke, in giving his judgment, said, "It appears in evidence that, in its own nature, the fire-engine is a personal moveable chattel, taken either in part, or in gross, before it is put up ; but then it has been insisted, that fixing it, in order to make it work, is properly an annexation to the freehold.

3. Rights to fixtures of the executor of tenant for life or in tail as against remainder-man :

as to trade fixtures :

"To be sure, in the old cases, they go a great way upon the annexation to the freehold ; and so long ago as Henry the Seventh's time, the Courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the Courts have gone upon, of relaxing the strict construction of law, is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term."

(c) 3 Atk. 13.

In another part of his judgment, his Lordship observed, "It is true the old rules of law have indeed been relaxed, chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man. But, even in these cases it does admit the consideration of *public conveniency* for determining the question.

"One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers."

The judgment concludes with these observations, "It is very well known that little profit can be made of coal-mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion."

The decision was followed by the case of *Lord Dudley v. Lord Warde* (d), which came before Lord Hardwicke a few years after *Lawton v. Lawton*, and was very similar in its circumstances. A bill was brought by the executor of tenant for life (or tenant in tail, for it did not appear which the testator was) against the remainder-man of the estate, to have a fire-engine, which had been erected by the testator for a colliery, delivered up as part of the personal estate: and it was adjudged in favour of the executor: And his Lordship, in reference to the point decided in *Lawton v. Lawton*, says, "If it is so in the case of a tenant for life, *query*, how would it be in cases of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing there is no

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material difference: The determinations have been from a consideration of the benefit of trade. A colliery is not only the enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health, he would not erect such an engine, at a vast expense, unless it would go to his family."

There appears to be no other express case in the books upon this part of the subject: but these decisions of Lord Hardwicke have been frequently recognized in the common law courts, viz., by Lord Mansfield, in *Lawton v. Salmon* (e), by Lord Kenyon, in *Penton v. Robart* (f), and by Lord Ellenborough, in *Elwes v. Maw* (g).

It will be observed, that none of the arguments employed by Lord Hardwicke respecting the benefit of the public, and the encouragement of trade, appear to have any application to the question as between heir and executor, where the owner of the fee, being the absolute owner of the land as well as the personal property which has been affixed to the freehold for the purposes of his trade, may dispose of the one as well as the other as he shall think fit for the benefit of his family, and where, consequently, it is not at all necessary, in order to encourage the erection of such works, to make any departure, in his favour, from the old rule of law (h).

With respect to the right of the executor of tenant for life, as against the remainder-man or reversioner, to fixtures set up for ornament, or domestic convenience; it is somewhat singular, that not a single case is to be found in the books relating expressly to this subject. Nevertheless, upon

Right of executor of tenant for life, &c., to ornamental fixtures, &c.

(e) 1 H. Black. 260, *in nota*.

(f) 2 East, 91.

(g) 3 East, 54.

(h) See the observations of Lord Cottenham in *Fisher v. Dixon*, 12 Cl. & F. 328, of Lord Campbell, *ib.*

330, 331, and of Lord Brougham, *ibid.* 332. See also the able and elaborate judgment of Wood, V.-C., in *Mather v. Fraser*, 2 Kay & J. 536; and *Walmsley v. Milne*, 7 C. B., N. S. 115.

the ground that the law is more favourable in this respect to the executor of tenant for life than to the executor of tenant in fee, it is clear, *à fortiori*, that all the cases which support the right of the latter to hangings, pier-glasses, tapestry, pictures, iron backs to chimneys, furnaces, grates, &c., are express authorities in favour of the right of the former; and further, that the strong expressions of Judges in favour of the heir, which, in the recent cases heretofore mentioned, somewhat weaken the effect of the determinations in favour of the claims of the executor of tenant in fee, do not affect them with relation to those of the executor of tenant for life or in tail.

4. Cases of
fixtures
between
landlord and
tenant.

4. With respect to the decisions between landlord and tenant, it has been so repeatedly laid down by the highest authorities that the right to fixtures is considered more favourably to the tenant, as against his landlord, than to the executors of tenant for life, or in tail (*i*), as against the remainder-man or reversioner, that it would be wrong to conclude that a fixture set up for ornament or domestic convenience, by a tenant for life, &c., may be claimed as personalty by his executor, from the fact that it has been decided to be a removable fixture, as between landlord and tenant. However, it is asserted in a work, in which this subject has been very fully and ably treated (*k*), that it cannot, upon authority, be affirmed of any specific article, that it is removable as between landlord and tenant, but that it is *not* removable as between the tenant for life and the remainder-man. And Lord Hardwicke seems to treat the two classes much in the same light, considering their claims to be founded on similar reasons: And although he says, that the case of a tenant for life is not quite so strong as that of a common tenant, yet many of his arguments are drawn from a close analogy between them (*l*).

(*i*) *Penton v. Robart*, 2 East, 91.
Elwes v. Maw, 2 East, 51. *Grymes*
v. Boweren, 6 Bingh. 439, 440.

(*k*) *Amos & Ferard on Fixtures*,
3rd edit., 175.
(*l*) *Ibid.*

ble in this respect to the executor of all the cases which gings, pier-glasses, s, furnaces, grates, f the right of the essions of Judges at cases heretofore the determinations enant in fee, do not executor of tenant

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But this is perfectly clear with regard to the decisions, as to fixtures, between landlord and tenant, that wherever it has been decided that fixtures are not removable by a common tenant, *à fortiori*, they are not removable by the executor of tenant for life or in tail, or the executor of tenant in fee. It will, therefore, be useful to point out some cases where the decisions have been against the right of removal by a common tenant.

It was decided in a celebrated case, after much deliberation, that the privilege established in favour of tenants in trade, does not extend to agricultural tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry. In that case it was held that a tenant could not remove a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, nor fold-yard wall, erected for the use of his farm, *even though he left the premises exactly in the same state as he found them on his entry (m)*. Hence it followed that the executors of tenants for life or in tail, or in fee, were not entitled to remove, as trade fixtures, things erected for the purposes of agriculture.

But by the stat. 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, erect any farm building or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture, they shall be the property of the tenant and removable by him after giving the landlord a month's notice in writing, unless the landlord elects to purchase them, in which case the value shall be ascertained by arbitration, as prescribed by the Act.

And this provision has been further extended to cases to which the Agricultural Holdings Acts, 1875 and 1883, respectively apply. The language of these Acts [38 & 39 Vict. c. 92, s. 53, and 46 & 47 Vict. c. 61, s. 34] is almost identical, and by them it is provided, that "where after the commencement of this Act a tenant affixes to his holding any

Executors are in no case entitled to fixtures set up for agriculture :

Stat. 14 & 15 Vict. c. 25, s. 3.

Stats. 38 & 39 Vict. c. 92, s. 53, and 46 & 47 Vict. c. 61, s. 34.

(m) *Elwes v. Maw*, 3 East, 28.

"engine, machinery, *fencing*, or other fixture, or erects any building (n), for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy." Then follow certain provisos as to (1) payment of all rent due before removal: (2) the avoidance of or making good damage: (3) the giving of one month's previous notice in writing to the landlord: and (4) the option in the landlord to purchase such fixtures.

In the Act of 1875 (sect. 53), there was also a proviso that "nothing in such section shall apply to a steam engine erected by the tenant if before erecting it the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord by notice in writing given to the tenant has objected to the erection thereof."

This proviso does not appear in the Act of 1883.

Executors not entitled to remove a conservatory, &c.

In *Buckland v. Butterfield* (o), a question arose whether a tenant for years had a right to remove a conservatory and pinery: The conservatory, which had been purchased by the tenant and brought from a distance, was by him erected on a brick foundation, fifteen inches deep; upon that was bedded a sill, over which was frame-work, covered with slate; the frame-work was eight or nine feet high at the end, and about two in front: This conservatory was attached to the dwelling-house by eight cantilevers let nine inches into the wall, which cantilevers supported the rafters of the conservatory: Resting on the cantilevers was a balcony with iron rails: The con-

(n) The words in italics are those which appear in sect. 34 of the Agricultural Holdings Act, 1883, but which do not appear in the corresponding section (53) of the Act of 1875, which Act the

Act of 1883 repeals, reserving, however, any right in respect of fixtures affixed before 1 Jan., 1884. (Sect. 62, d.)

(o) 2 Brod. & Bingh. 54.

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servatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlour chimney by a flue: Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library: A folding door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house to which it had been attached became exposed to the weather: Surveyors who were called, stated that the house was worth 50*l.* a year less after the conservatory and pinery had been removed: Dallas, C.J., in delivering the judgment of the Court of Common Pleas, said, "Allowing that matters of ornament may or may not be removable, and that whether they are so or not, must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended, if such right were to be established in the present instance; and we agree with the learned judge who tried the cause (Mr. Baron Graham), in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste" (*p*). This case, therefore, is an authority that the executors of tenant for life, or in tail, or in fee, are not entitled to remove a conservatory such as described above (*q*).

In the case of *Grymes v. Boweren* (*r*), the question was *Pumps*.

(*p*) See also *Accord. Jenkins v. Gething*, 2 Johns. & H. 520; in which case, Wood, V.-C., held that though greenhouses could not be removed, nor the boiler put into the masonry, the pipes connected with screws were removable. It is expressly said by Lord Kenyon, in *Penton v. Robart*, 2 East, 90, that where hothouses and greenhouses, and the like, have been put up by nurserymen and gardeners at their own expense, such things might be taken away at the end of the term: but

Lord Ellenborough, in *Elwes v. Maw*, speaking of that *dictum*, said, that there certainly existed no decided case, and he believed, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension: And Dallas, C.J., in the above case of *Buckland v. Butterfield*, seems to approve Lord Ellenborough's observation.

(*q*) See also *West v. Blakeway*, 2 M. & G. 729.

(*r*) 6 Bingh. 437.

respecting a tenant's right to remove a pump which he had erected on the demised premises at his own expense: It was attached to a stout perpendicular plank: this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches: The pin, which had a head at one end, and a screw at the other, passed entirely through the wall: The tube of the pump passed through a brick flooring into a well beneath: This well had originally been open, but the tenant had arched it over when he erected the pump: And in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed: Under these circumstances the Court of Common Pleas was of opinion, that the pump was removable as a tenant's fixture.

The fixtures must be removed before the tenancy expires:

It may be observed that it has been decided, that a tenant must use his privilege in removing fixtures, *during the continuance of his term*: for if he forbears to do so within this period the law presumes that he voluntarily relinquishes his claim in favour of his landlord (s). Hence it follows, that if a tenant from year to year of a house dies, and his executor or administrator gives a notice to quit, he should take care to

(s) *Lyde v. Russell*, 1 B. & A. 394. The tenant's right has been defined to continue during his original term, and such further period of possession by him, as he holds the premises under a right still to consider himself a tenant: *Mackintosh v. Trotter*, 3 M. & W. 186. In the absence of special contract, tenants' fixtures cannot be removed after the termination of the lease, and this rule applies, whether the lease determines by effluxion of time, or by re-entry on forfeiture. *Pugh v. Arton*, L. R., 8 Eq. 626.

In cases within the Agricultural Holdings Act, 1883, a tenant has a *reasonable time after the termination of the tenancy* to remove any engine, machinery, fencing, or other fixture affixed by him or any building erected by him, if he is not under the Act, or otherwise, entitled to compensation therefor, or if he has not affixed or erected such fixture, or building, in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord.

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Ch. II. § III.] *Separate Property of Widow.*

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remove the fixtures, or dispose of the right of the deceased to
them, before such notice expires. In the case of a tenant for
life, or in tail, his executor must, it should seem, remove the
fixtures to which he is entitled within a reasonable time after
the death of the testator.

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In conclusion of the subject of the right of executors to
fixtures generally, it may be observed, that, after all, the
question whether fixtures be removable or not in a great
measure depends on the individual circumstances of each par-
ticular case, with reference to the nature of the article, and
the mode in which it is fixed (t).

General
conclusion as
to the right
to fixtures.

3. *Separate Property, Paraphernalia, and other Rights of the Widow.*

3. Personal chattels inanimate in possession from which
the executor or administrator is excluded in favour of the
widow.

By reason of the provisions of the Married Women's Pro-
perty Act, 1882, all gifts made to a married woman on or after
January 1, 1883, become her separate property as if she were
a *feme sole*. But inasmuch as questions may arise as to gifts
to the wife, and separate property accruing to her before that
date, it seems convenient to preserve in this edition the state-
ment of the Law on this subject in the shape in which it
appeared in the earlier editions.

Marriage was formerly an absolute gift to the husband, as
well of all the chattels of which the wife was actually and
beneficially possessed at the time he married her (u), as also

(t) By Tindal, C.J., in *Grymes v. Boweren*, 6 Bingh. 439. See also *Avery v. Cheslyn*, 3 A. & E. 73. *Walsley v. Milne*, 7 C. B., N. S. 115.

(u) Co. Lit. 351, b. And there

was no distinction in this respect between property to which the wife was entitled at Equity, and property to which she was entitled at Law: *Osborn v. Morgan*, 9 Hare, 432.

of such as came to her during marriage, whether she survived him or not (x). And consequently, though his wife outlived

(x) These rules of law, however, had been considerably modified by the Married Women's Property Act (33 & 34 Vict. c. 93), which came into operation on the 9th day of August, 1870. By that Act (which, save in respect of accrued rights and liabilities, is repealed by the Married Women's Property Act, 1882), any married woman became absolutely entitled, independent of her husband, to—

- a. Her earnings, made separately from her husband, and investments thereof (s. 1).
- b. Government annuities and deposits in savings banks in her own name, whether before or after marriage (s. 2).
- c. Sums invested in certain securities, companies, or societies (ss. 3, 4, 5), in respect of which the married woman had obtained the statutory order required by the Act.
- d. Policies of insurance, and all benefits thereof, effected by her on her own life or her husband's for her separate use, if so expressed on the face of the policy (s. 10).
- e. Any property hers before marriage, which her husband, by writing under his hand, had agreed with her should be her separate property after marriage (s. 11). And if married on or after the 9th of August, 1870, to—
- f. Any personal property to which a woman shall become entitled during her marriage as next of

kin or one of the next of kin of an intestate, or any sum not exceeding £200 to which she shall after her marriage become entitled by deed or will (sect. 7). Rents and profits of real property descending on any woman married after the passing of the Act as heiress or coheiress of an intestate (sect. 8). In *Johnson v. Johnson*, 35 C. D. 345, it was decided that the 8th section of the Act does not enable a woman to pass by an unacknowledged deed the fee simple of real estate descended upon her. The words "shall become entitled" in these sections of this Act apply to a reversion falling in after marriage. *Lane v. Oakes*, 30 L. T. N. S. 726. *Howard v. Bank of England*, L. R., 19 Eq. 295. It is otherwise under the words of section 5 of the Act of 1882. *Reid v. Reid*, 31 C. D. 402. See *post*, p. 662 (b). All the Act does is to create a statutory separate use. It does not give a legal separate property, nor give, excepting under the 11th section as between husband and wife, a remedy to the wife except through a Court of Equity. Her separate earnings, therefore, are under this Act equitable assets, distributable amongst all her creditors, and not legal assets out of which her executor is entitled to retain his own debt. *Re Poole's Estate*, 6 C. D. 739. This Act, it will be observed,

him, they went to his executor, if he made a Will, or to his administrator if he died intestate.

But by conveying her property to trustees before marriage, the wife might, independently of the Married Women's Property Acts, preserve it, in cases clear of fraud, separate from her husband, and those claiming from or through him, both at law and in equity: for wherever the trust can be supported in equity, the trustee will be entitled at law (*y*). So that if personal property was bequeathed to, or settled upon, a married woman for her separate use, even without the precaution of the intervention of trustees, the wife's separate interest was protected in equity by the conversion of her husband into a trustee for her (*z*); and consequently, upon his death, the property did not form a part of the beneficial estate of his executors or administrators (*a*).

These rules will still govern all those cases which do not

Separate
property.

Law since
M. W. P. Act,
1882.

contains no section like section 1 of the Act of 1882 affecting the capacity of a married woman to acquire, hold, and dispose by Will or otherwise of all real or personal property as if she were a *feme sole*.

(*y*) By Lord Mansfield, in *Hase- linton v. Gill*, 3 T. R. 620.

(*z*) *Parker v. Brooke*, 9 Ves. 383. *Rich v. Cockell*, *ibid.* 375, in Lord Eldon's judgment. Where there is sufficient evidence to show an intention on the part of the wife that the husband shall employ the money for his own use, or for the family expenditure, as he might think proper, the assent of the wife to such application of the money puts an end to the trust for her separate use: *Gardner v. Gardner*, 1 Giff. 126.

(*a*) Thus, according to the equitable doctrine of separate use,

if the husband survives and the wife dies in actual possession of her separate property without having expressed her right of disposing of it by deed or Will, the quality of separate property ceases at her death, and the fund belongs to the husband in his marital right, so that he need not become her administrator in order to entitle himself to it: *Molony v. Kennedy*, 10 Sim. 254. See also *Carme v. Brice*, 7 M. & W. 183. *Messenger v. Clarke*, 5 Exch. 388. *Bird v. Peagram*, 13 C. B. 639. *Bourne v. Fosbrook*, 18 C. B., N. S. 515. The appointment by a married woman of executors is not a disposition by her of her separate estate so as to deprive her husband of separate estate undisposed of by her Will. *Re Lambert's Estate* 39 C. D. 626.

Stat. 45 & 46
Vict. c. 75,
s. 1.

fall within the Married Women's Property Act, 1882. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by section 1, subs. (1), enacts that, "a married woman shall "in accordance with the provisions of this Act be capable of "acquiring, holding, and disposing by Will or otherwise of "any real or personal property as her separate property in "the same manner as if she were a *feme sole* without the "intervention of any trustee."

S. 2.

By section 2 it is enacted, that "every woman who marries "after the commencement of this Act" [January 1, 1883], "shall be entitled to have and to hold, as her separate property, and to dispose of, in manner aforesaid, all real and "personal property which shall belong to her at the time of "marriage, or shall be acquired by or devolve upon her after "marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, "or occupation in which she is engaged, or which she carries "on separately from her husband, or by the exercise of any "literary, artistic, or scientific skill."

S. 5.

And by section 5 (b), it is enacted that "every woman "married before the commencement of this Act shall be "entitled to have and to hold, and to dispose of, in manner "aforesaid, as her separate property, all real and personal

(b) It is to be observed that in *Reid v. Reid*, 31 C. D. 402, following *Re Tucker*, 54 L. J., Ch. 874, and *Re Adames Trusts*, 54 L. J. Ch. 878, and overruling *Re Dixon*, 54 L. J. Ch. 964, *Baynton v. Collins*, 27 C. D. 604, *Thompson v. Curzon*, 29 C. D. 177, it was decided that if a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the Act acquired a title whether vested or contingent, and whether in reversion or

remainder, to any property, such property is not made her separate estate by sect. 5 (1) of the Act though it fall into possession after the commencement of the Act. On the other hand, sect. 7 of the Act of 1870, in which the words are "*to which she shall become entitled*" was held to include property to which the married woman had a reversionary title before marriage but which fell into possession afterwards. *Lane v. Oakes*, 30 L. T., N. S. 726. *Howard v. Bank of England*, L. R. 19 Eq. 295, 300.

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fall into possession after
necement of the Act.
her hand, sect. 7 of the
D, in which the words are
she shall become entitled"
to include property to
married woman had a
y title before marriage
fell into possession after-
ane v. Oakes, 30 L. T.,
. Howard v. Bank of
L. R. 19 Eq. 295, 300.

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"property, her title to which, whether vested or contingent,
"and whether in possession, reversion, or remainder, shall
"accrue after the commencement of this Act, including any
"wages, earnings, money, and property so gained or acquired
"by her as aforesaid."

And further, by section 19, it is enacted, "that nothing in s. 19.
"this Act contained shall interfere with, or affect, any settle-
"ment, or agreement for a settlement, made or to be made,
"whether before or after marriage, respecting the property
"of any married woman, or shall interfere with, or render
"inoperative, any restriction against anticipation at present
"attached, or to be hereafter attached, to the enjoyment of
"any property or income by a woman under any settlement,
"agreement for a settlement, will, or other instrument: but
"no restriction against anticipation contained in any settle-
"ment, or agreement for a settlement, of a woman's own pro-
"perty to be made or entered into by herself, shall have any
"validity against debts contracted by her before marriage,
"and no settlement, or agreement for a settlement, shall have
"any greater force or validity against creditors of such
"woman than a like settlement, or agreement for a settle-
"ment, made, or entered into, by a man would have against
"his creditors" (c).

The scope of section 1 seems to be to declare the status
of a married woman, and not to deal with the kinds of pro-
perty affected by the Act, which latter are dealt with by
sections 2 and 5.

Application of
sect. 1.

For it can hardly be that the statute intended to make all

(c) It may be observed that
section 19 excludes from the opera-
tion of section 5 and the other
sections, property the subject of
any settlement, which would have
bound it if the Act had not
passed, even though such property
may accrue to the wife after the
commencement of the Act. *Re*

Stonor's Trusts, 24 C. D. 195. *Re*
Whitaker, 34 C. D. 227. *Han-*
cock v. Hancock, 38 C. D. 78.
See also *Re Queade's Trusts*, 54
L. J. Ch. 788, which seems to have
been disapproved of by the Court
of Appeal in *Hancock v. Hancock*,
ubi sup.

property possessed, or acquired by, a married woman in her own right her separate property, irrespective of the date of her marriage and the date of the acquisition of that property: otherwise section 2, subs. 1, and section 5 would be unnecessary. And there seems to be no property to which section 1 can apply besides the subject-matter of sections 2 and 5. It cannot apply to property which is separate property by marriage settlement, because this is excluded from the operation of the Act by section 19, nor to *chooses in action* not reduced into possession, because the Married Women's Property Act does not affect devolution, nor to property which has become the separate property of the wife by virtue of the Act of 1870, because the interest given to the wife under that Act is merely a beneficial interest, and the Act of 1882 does not amend the Act of 1870, but repeals it, and provides that such repeal shall not affect any act done or right acquired while the Act of 1870 was in force (*cc*).

The Married Women's Property Act, 1582, unlike the 25th section of 20 & 21 Vict. c. 85, does not affect the devolution of property undisposed of by the married woman (*d*).

The inquiry as to what words are sufficient according to the equitable doctrine to give the wife an interest separate from her husband appears to belong more properly to the general Law of Husband and Wife, than to a work on the Law of Executors and Administrators; and it is not, therefore, deemed requisite to pursue it at any length in this Treatise: However, it is to be observed that questions as to the construction of settlements on married women or women about to be married may still not unfrequently arise, notwithstanding the Married Women's Property Act, 1882, because section 19 of that Act excludes such settlements from the operation of it. Independently of the Married Women's Property Acts, a gift to the separate use of an unmarried woman excludes

What words
will give a
separate
estate:

(*cc*) This seems to be the view also taken in *Re Cuno*, 43 C. D. 12. (d) *Re Lambert's Estate*, 30 C. D. 626.

married woman in her
 active of the date of
 ion of that property:
 on 5 would be un-
 property to which
 matter of sections 2
 which is separate
 se this is excluded
 on 19, nor to *choses*
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 devolution, nor to
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 1870, but repeals it,
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 in force (cc).

1882, unlike the 25th
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efficient according to
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 that questions as to
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 ently arise, notwith-
 y Act, 1882, because
 ents from the opera-
 Women's Property
 ried woman excludes

Lambert's Estate, 30

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the executors of a future husband (e), and an antenuptial settle-
 ment of money or jewels, furniture, or other movables, made
 by the husband himself of his own property upon the wife,
 will be valid, as well against the husband himself and
 volunteer claimants from him, as also against his creditors.
 Nor will it differ the case that the husband was indebted at
 the time of making the settlement, and that his future wife
 knew it: nor that the husband had the joint-possession, as
 long as he lived, of the furniture, &c. (f); nor that the wife
 brought him no portion.

The same principle of equity which secures the interest
 of the wife in the case of a settlement or bequest, will
 protect it when the husband *agrees* before marriage, by
 writing, that his wife shall be entitled to specific parts of
 her personal estate to her separate use, although the legal
 title becomes vested in him by the subsequent marriage:

Antenuptial
 settlement of
 money, jewels,
 &c., by the
 husband.

Antenuptial
 agreement in
 writing.

(e) Tullett v. Armstrong, 4
 Mylne & Cr. 377.

(f) Cumpion v. Cotton, 17 Ves.
 864. But where the husband,
 with the knowledge of the wife,
 had committed an act of bank-
 ruptcy before the execution of the
 settlement, and an adjudication of
 bankruptcy followed within twelve
 months, the settlement, though
 antenuptial, was, while such act
 of bankruptcy was available for
 adjudication, held invalid;—for,
 by relation, the property had
 ceased to be the property of the
 bankrupt before the settlement
 was executed: Fraser v. Thomp-
 son, 4 De G. & J. 659. In the
 case of Bulmer v. Hunter, L. R.,
 8 Eq. 46, a man executed an ante-
 nuptial settlement and married a
 woman with whom he had pre-
 viously cohabited with intent to
 defraud his creditors, the wife

being implicated in the trans-
 action, and it was held that the
 settlement was fraudulent and
 void as against creditors. And by
 section 47 (2) of the Bankruptcy
 Act, 1883, it is provided that "any
 "covenant or contract made in
 "consideration of marriage for the
 "future settlement on or for the
 "settlor's wife or children of any
 "money or property wherein he
 "had not at the date of his
 "marriage any estate or interest
 "whether vested or contingent in
 "possession or remainder, and not
 "being money or property of or in
 "right of his wife shall on his
 "becoming bankrupt before the
 "property or money has been
 "actually transferred or paid
 "pursuant to the contract or cove-
 "nant be void against the trustee
 "in the bankruptcy."

In such a case the husband will be a trustee for the wife's separate use, and the trust will bind his executors and administrators (g).

Postnuptial
settlement.

Likewise a *post-nuptial* settlement of property by the husband on the wife is obligatory upon himself and all persons claiming as volunteers from or through him (h). And such a settlement will protect the property even against creditors, unless it can be considered, from the circumstances under which it was made, fraudulent as against them (i).

(g) But the agreement must be in writing, by reason of the 4th section of the Statute of Frauds, enacting that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized: *Randall v. Morgan*, 12 Ves. 74. *Warden v. Jones*, 23 Beav. 487. S. C., 2 De G. & J. 76. *Goldcutt v. Townshend*, 28 Beav. 445. These and other authorities have overruled *Dundas v. Duters*, 1 Ves. 199. But if a man, on his marriage with a woman enters into a mere parol agreement with her, that a sum of money shall be transferred to trustees upon trust for himself, his intended wife, and the children of the marriage, and the money is, before the marriage, actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact that the instrument declaring the trusts is executed by them subsequently to the marriage, does not make it a voluntary

instrument, and enable creditors to set it aside: *Cooper v. Wornald*, 27 Beav. 270. Indeed, if the non-reduction into writing be owing to the fraudulent conduct of the husband, equity will relieve: *Lady Montacute v. Maxwell*, 1 P. Wms. 620.

(h) See *Curtis v. Price*, 12 Ves. 89.

(i) The questions of the avoidance of settlements as against creditors under stat. 13 Eliz. c. 5, and the avoidance of voluntary settlements of lands, &c., as against purchasers under stat. 27 Eliz. c. 4, are so wide, and the authorities upon them so numerous, that it is considered better to refer the reader to the text-books which deal exclusively with the subject, and not to undertake a detailed examination of the law on a point which is but distantly connected with the subject-matter of this work. See May on Fraudulent and Voluntary Dispositions of Property, 2nd ed.

As to the effect of the bankruptcy of a person making a post-nuptial settlement upon such settlement, see section 47 (1) of the Bankruptcy Act, 1883, by

trustee for the wife's
and his executors and

of property by the
upon himself and all
or through him (h).
property even against
l, from the circum-
fraudulent as against

at, and enable creditors to
de : Cooper v. Wornald,
270. Indeed, if the non-
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e v. Maxwell, 1 P. Wms.

Curtis v. Price, 12 Ves.

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ns of Property, 2nd ed.
the effect of the bank-
a person making a post-
settlement upon such
, see section 47 (1) of
ruptcy Act, 1883, by

Besides the means already described of the acquirement
"according to the Equitable doctrine" of separate property,
by a wife, she, even before the Married Women's Property
Acts, might also do so by carrying on trade apart from her
husband, on her separate account, either in consequence of
an express agreement between her and her husband before
marriage, or by his permission after marriage (h). There
was an important distinction, with respect to the estate of the
executor of the husband, between the wife's right to property
acquired in the two cases. When the agreement was made
previously to marriage, since the consideration was valuable,
the transaction was not only to be obligatory upon the husband
and his executors, but also binding upon his creditors; when
the agreement originated during the marriage, it was void
against his creditors, but good against himself (l).

Separate
property
acquired by
wife's separate
trading.

The savings arising from the separate property of the wife
will not form a part of the estate of her husband's executor :
for "the sprout is to savour of the root and go the same

Savings, &c.,
from wife's
separate
property :

which "any settlement of property
"not being a settlement made
"before and in consideration of
"marriage, or made in favour of
"a purchaser or incumbrancer in
"good faith and for valuable
"consideration, or a settlement
"made on or for the wife or
"children of the settlor of property
"which has accrued to the settlor
"after marriage in right of his
"wife, shall, if the settlor becomes
"bankrupt within two years after
"the date of the settlement be
"void against the trustee in the
"bankruptcy, and shall if the
"settlor becomes bankrupt at any
"subsequent time within ten years
"after the date of the settlement
"be void against the trustee in the
"bankruptcy, unless the parties

"claiming under the settlement
"can prove that the settlor was at
"the time of making the settle-
"ment able to pay all his debts
"without the aid of the property
"comprised in the settlement, and
"that the interest of the settlor in
"such property has passed to the
"trustee of such settlement on the
"execution thereof."

As to post-nuptial settlements,
see also Reed's Bills of Sale Act,
7th ed., p. 53.

(h) See Haddon v. Fladgate, 1
Sw. & Tr. 48, ante, p. 54, note (f).
An agreement with, or permis-
sion from, her husband has not
been necessary, since the Married
Women's Property Acts, 1870 and
1882. See ante, p. 660, n. (x).

(l) 2 Rep. 165, 2nd edition

way" (m). And so jewels, or other things, bought by the wife, with money arising out of her separate property, will not be assets liable to the husband's debts (n). But as she is entitled to deal with her separate estate as she pleases, if she directly authorizes any moneys which form a part of it, or the savings arising from it, to be paid to her husband, he is entitled to receive them, and she can never recall them (o).

gifts from the
husband to the
wife :

The general rule of law, before the Married Women's Property Act, derived from the unity of person, was that gifts from the husband to the wife were void: "But in Courts of Equity," Lord Hardwicke says in *Lucas v. Lucas* (p), "gifts between husband and wife have often been supported, though the law does not allow the property to pass."

For though the property did not pass at Law, yet in Equity a husband, being the owner at Law, might become a trustee for his wife, and if by clear and irrevocable acts he made himself such trustee the gift to his wife was conclusive (q).

Thus in *Lucas v. Lucas* (r), Lord Hardwicke decreed that the defendant in the cause, a widow, was entitled to £1,000 South Sea Annuities transferred by her husband, in his lifetime, into the name of his wife, as a valid gift against the husband and his representatives.

(m) *Gore v. Knight*, 2 Vern. 535. So as to her savings out of her alimony: *Moore v. Barber*, 34 L. J., Ch. 687.

(n) *Duncan v. Cashin*, L. R., 10 C. P. 554. Accordingly in *Brooke v. Brooke*, 25 Beav. 342, husband and wife had for many years lived, and were still living separate: He remitted money for her maintenance and support: She saved a considerable portion:—And it was held by Romilly, M.R., that the husband

could not recover back these savings; for that the remittances must, as against the husband, be treated as her separate estate.

(o) *Caton v. Rideout*, 1 Mac. & G. 599. But see also *Darkin v. Darkin*, 17 Beav. 578.

(p) 1 Atk. 271. *Graham v. Londonderry*, 3 Atk. 393.

(q) *Mews v. Mews*, 15 Beav. 533. *Grant v. Grant*, 34 L. J. Ch. 641. See *post*, p. 670, as to imperfect gifts by husband to wife.

(r) 1 Atk. 271.

ings, bought by the
separate property, will
debts (n). But as she
state as she pleases, if
sh form a part of it,
paid to her husband,
she can never recall

Married Women's Pro-
person, was that gifts
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rant, 34 L. J. Ch. 641.
p. 670, as to imperfect
band to wife.

k. 271.

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So stock purchased by a man in the names of himself and his wife, was, on his death, held by the Vice-Chancellor (Sir John Leach) to go to her as the survivor (s). And in a similar case, Lord Eldon, C., said it was *prima facie* a gift to herself in the event of her surviving, unless evidence of contemporaneous acts, showing a contrary intention, were produced (t). So where the husband lends out money upon securities taken in the names of himself and wife, and dies, the wife is entitled by survivorship, if there are sufficient assets without this money to pay debts (u). And, generally, where a husband purchases personal property in the name of his wife, or in their joint names, it will be presumed, in a case clear of fraud, to have been intended as an advancement and provision for the wife, and on surviving her husband she will be entitled, unless he has aliened the property in his lifetime (x).

But where the widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion (y); and nothing less will do than a clear irrev-

stock, &c.,
purchased by
husband in the
names of him-
self and wife,
or in her
name :

what is suffi-
cient evidence
of a gift by
husband to
wife.

(d) Lorimer v. Lorimer, MSS.
Mr. Beames, n. (46), to Rider v.
Kidder, 10 Ves. 367, 2nd edit.

(l) Wilde v. Wilde, MS. 1 Rop.
Husband and Wife, by Jacob, 54.
Vance v. Vance, 1 Beav. 605.
Williams v. Davies, 33 L. J., P. &
M. 127. Re Ekin's Trusts, 6
C.D. 115.

(u) Christ's Hospital v. Budgin,
2 Vern. 683.

(z) Kingdon v. Bridges, 2 Vern.
67. Grist v. Hewer, 8 Ves.
129. But the presumption may
be rebutted : Marshal v. Crutwell,
L. R., 20 Eq. 328. So where a
man from time to time gave his
wife sums of money, part of which
accumulated as stock in his name,
and he received the dividends and

paid them to her, and in every
way treated the stock as her
separate property : it was held by
Sir Cresswell Cresswell, that the
wife had acquired a separate estate,
of which the husband had con-
sidered himself trustee for her,
and to which the *jus disponendi*
attached : In the goods of Smith,
1 Sw. & Tr. 125.

(y) Walter v. Hodge, 2 Swanst.
92. Re Whittaker, 21 C. D. 657
The wife making such a claim
comes within the well established
rule, that a person, making a claim
against the estate of a dead man
cannot sustain that claim by his
or her own deposition : there must
be some corroboration of it.

cable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife (z).

(z) *M'Lean v. Longlands*, 5 Ves. 79, by Lord Alvanley. See also 2 Swanst. 104. *Mews v. Mews*, 15 Beav. 329. *Hoyes v. Kinderley*, 2 Sm. & G. 195. *Lloyd v. Pughe*, L. R., 8 Ch. 88. *Parker v. Lechmere*, 12 C. D. 256. In *Lloyd v. Pughe*, an account in the name of the wife was held to be a mere agency account of the husband, and on his death the credit balance was held to be part of his estate though the wife survived him. In *Parker v. Lechmere*, the opening of an account with money coming to the wife in her own right, in the name of the wife, was held to be evidence of the gift to the wife. If the husband makes an imperfect gift to the wife the Court will not in the case of a husband and wife, any more than in any other case, hold that the intending donor is a trustee for the wife. *Re Breton*, 17 C. D. 416. *Moore v. Moore*, L. R., 18 Eq. 474. See, however, the cases to the contrary cited by Hall, V.-C., in his judgment in *Re Breton*, which the learned Judge seems to have declined to follow. *Grant v. Grant*, 34 L. J. Ch. 641. *Fox v. Hawks*, 13 C. D. 822. *Baddeley v. Baddeley*, 9 C. D. 113, in which imperfect gifts by a husband to a wife seem to have been treated as not governed by the rule, applying to imperfect gifts to a stranger, laid down in *Milroy v. Lord*, 4 De G. F. & J. 264. *Richards v. Del-*

bridge, L. R., 18 Eq. 11. Cases of imperfect gifts of a husband to a wife will be less likely to arise now that the wife can take a gift as if she were a *feme sole* (M. W. P. Act, 1882), but of course may arise where the form of instrument is not applicable to transfer the property in question. The ground for supporting, as a declaration of trust, an instrument prior to the M. W. P. Act, 1882, purporting to transfer property to the wife directly, seems to have been that the husband, if he knew the law, could not have intended the instrument to operate as a transfer, and if the gift is intended to be taken by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. It must be remembered that, to constitute a gift, there must be either a transfer of property or a declaration of trust, for there is no equity to perfect an imperfect gift. See *Milroy v. Lord*, 4 De G. F. & J. 264, 274. *Richards v. Delbridge*, L. R., 18 Eq. 11. *Moore v. Moore*, *ibid.* 474, and *conf. Richardson v. Richardson*, L. R., 3 Eq. 686, and *Morgan v. Malleson*, L. R., 10 Eq. 475, disapproved in *Richards v. Delbridge* (*vide supra*), but approved by Bacon, V.-C., in *Fox v. Hawks*, 13 C. D. 822. As to what is

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n Richards v. Delbridge
a), but approved by
-C., in Fox v. Hawks,
822. As to what is

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In a case, however, where a husband gave directions to
his bankers to invest a sum of money in the funds, in the
joint names of himself and wife, and their brokers accord-
ingly made the purchase: Lord Langdale, M.R., held that
the wife was entitled to the stock by survivorship, although
the husband died after the contract, but before the transfer
had been completed (a).

Those gifts of money by the husband to the wife for Pin-money :
clothes, or to purchase ornaments, or for her separate expen-
diture, which are usually called pin-money (b), will be good
in equity as against the husband, and all volunteer claimants
through him (c).

Similar allowances have been supported in equity; as and similar
where the husband voluntarily allowed the wife to dispose allowances
and make profit of all such butter, eggs, poultry, pigs, fruit, from husband
and other trivial matters arising from a farm (over and to wife :
besides what was used by the family) for her own separate
use, called it her pin-money; out of which the wife saved
100l.; which the husband borrowed, and died; Lord Chan-

necessary to constitute a declara-
tion of trust, see Warriner v.
Rogers, L. R., 16 Eq. 340, 348,
where Bacon, V.-C., says, "the
one thing necessary to give
validity to a declaration of trust
I take to be, that the donor or
grantor should have absolutely
parted with that interest which
had been his up to the declara-
tion, should have effectually
changed his right in that respect,
and put the property out of his
power, at least in the way of
interest," and in Moore v. Moore,
L. R. 18 Eq. 474, 481, Hall, V.-C.,
says, "Though the case is one of
husband and wife, the *onus pro-*
bandi rests upon the plaintiff to
make out a satisfactory case to

"entitle her to relief in respect of
"these sums of stock founded on
"the alleged gift, and the case
"must be tried and determined
"exactly in the same way as it
"would have been tried and deter-
"mined if a bill had been filed by
"the next friend of the wife in
"the lifetime of the husband
"against the husband."

(a) Vance v. Vance, 1 Beav.
635.

(b) As to the nature of pin-
money, see the elaborate observa-
tions of Lord Brougham, C., in
Howard v. Digby, 2 Cl. & Fin.
634.

(c) 2 Roper, Husband and Wife,
132, 2nd edit.

cello: Talbot decreed, that *there being no deficiency of assets to pay debts*, the widow should come in as a creditor for the 100*l.*; and the Court mentioned the case of *Calmady v. Calmady*, where there was a like agreement made betwixt husband and wife, that upon every renewal of a lease by a husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money (*d*).

See also in *Mangey v. Hungerford* (*e*), the wife had saved a considerable sum of money out of housekeeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by answer that she was not bound to make such a discovery; and upon exceptions to the answer, it was held sufficient by Lord King.

There has already (*f*) been occasion to show that, under the Divorce Act, 1857, s. 25, property acquired by a wife, after obtaining a protection order, may be disposed of by her in all respects as a *feme sole*, and will devolve on her death as if her husband were then dead.

property
acquired by
wife after a
protection
order under
Divorce Act :

savings out of
pin-money and
other allow-
ances, when
liable to hus-
band's debts :

It often happens that pin-money is settled on the wife by agreement previous to marriage; in which case it falls under a different consideration: and upon the principles already explained, the savings by the wife out of it will be protected as her separate property, not only against the husband and volunteer claimants through him, but also from his creditors. But if the wife, by good management, effect savings out of her pin-money or other allowance made by the husband, *not* in pursuance of an antenuptial contract, such savings, as well as jewels so purchased by the wife out of them, will not, it should seem, be exempt from the husband's debts, but will be assets for the purpose of satisfying them, in the hands of his executor (*g*), although protected from voluntary claims.

(*d*) *Slanning v. Style*, 3 P. Wms.

(*f*) *Ante*, p. 55.

339.

(*g*) *Willson v. Pack*, Prec. Chan.

(*e*) 2 Eq. Cas. Abr. 156, in marriage.

297.

no deficiency of assets in as a creditor for the case of *Calmdy v. Reemant* made betwixt renewal of a lease by a by the tenant to the separate money (d).

(e), the wife had saved housekeeping, and in a recovery of what she had she was not bound to exceptions to the answer,

on to show that, under any acquired by a wife, be disposed of by her devolve on her death as

settled on the wife by which case it falls under the principles already of it will be protected against the husband and also from his creditors. t, effect savings out of de by the husband, not st, such savings, as well out of them, will not, e husband's debts, but satisfying them, in the protected from voluntary

Ante, p. 55.
Villson v. Pack, Prec. Chan.

If pin-money be in arrear, and the husband dies, the wife may claim the arrears against her husband's representatives: though such claim cannot, generally speaking, be carried further back than one year's income (h): Which restriction appears to have been founded partly on a supposed satisfaction by acquiescence, on the notion of the consent of the wife, to make it a common fund for the expense of the family (i); and partly on the consideration, that the money is meant for the dress and ornament of the wife, in a mode suitable to the degree of the husband, so as to maintain his dignity, and not for the accumulation of the fund; so that if the wife does not choose to expend the money for the purpose to which it was appropriated, viz., to support his and her rank in society, she cannot justly claim the arrears of it (k). Again, if pin-money be in arrear, and the wife dies, her representatives cannot sustain any claim for it whatever; the ground of which rule is, that the pin-money was not meant for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband: The authorities connected with this subject, and the nature of pin-money in general, were fully discussed, and commented on in the arguments of counsel and the judgment of Lord Brougham in a case relating to the arrears of the pin-money of the Duchess of Norfolk (l).

Arrears of pin-money, what recoverable.

Another instance where the wife may acquire a property in her husband's personal chattels, by gift from him, so as to exclude his executors or administrators, is to be found in her paraphernalia. The term is borrowed from the civil law, and is derived from the Greek, *παρά φερνή*, i.e. something to which she is entitled over and above dower. Our law uses it to signify the apparel and ornaments of

Paraphernalia:

what are so considered:

(h) *Peacock v. Monk*, 2 Ves. Sen. 190. *Thrupp v. Harman*, 3 M. & K. 513.

(k) *Howard v. Digby*, 2 Cl. & Fin 634, 657.

(l) *Ibid.* 634. See also *Jodrell v. Jodrell*, 9 Beav. 45.

(i) *Brodie v. Barry*, 2 V. & B. 36.

the wife, suitable to her rank and degree (*m*). What are to be so considered, are questions to be decided by the Court, and will depend upon the rank and fortunes of the parties (*n*).

Pearls and jewels, whether usually worn by the wife, or only on birthdays, and other public occasions, are to be considered paraphernalia (*o*). In the reign of Queen Elizabeth, the executors of Viscount Bindon brought detinue against the widow of the deceased viscount, and declared upon the detainer of certain jewels: The defendant justified the detainer of them as her paraphernalia: It was said by Manwood, Chief Baron, that paraphernalia ought to be allowed to a widow, having regard to her degree, and in this case the husband of the defendant being a viscount, 500 marks was but a good allowance for such a matter (*p*).

In the reign of Charles I. a chain of diamonds and pearls worth 370*l.*, being usually worn by a lady, who was a daughter of an earl of Ireland, and a baron of England, and the wife of a knight and a serjeant-at-law of the king, were considered *bona paraphernalia* (*q*). In the year 1674, Lord Keeper Finch said, he never knew any paraphernalia allowed, but where the party was noble either by birth or marriage (*r*): but in the year 1721, Lord Macclesfield, in the case of *Tipping v. Tipping* (*s*), decreed, that the widow of a commoner should have jewels, &c., to the value of 200*l.* and

(*m*) 2 Black. Comm. 436. A bed is also in some authors enumerated among the paraphernalia: Com. Dig. Baron and Feme (F. 3). Noy enumerates "all her apparel, her bed, her copher, her chains, borders, and jewels." Max. c. 49. And Swinburne mentions the ancient and general custom, as to widows, of the province of York, as extending "not only to their apparel, and a convenient bed, but a coffer with divers things therein

necessary for their own persons," Pt. 6, s. 7, pl. 5.

(*n*) 2 Rep. Husband and Wife, 141, 2nd edit.

(*o*) *Graham v. Londonderry*, 3 Atk. 394, by Lord Hardwicke.

(*p*) Viscountess Bindon's case, 2 Leon. 166, pl. 201.

(*q*) *Lord Hastings v. Sir A. Douglas*, Cro. Car. 343.

(*r*) *Lady Tyrrell's case*, 1 Freem. 304.

(*s*) 1 P. Wms. 729.

(m). What are to be decided by the and fortunes of the

orn by the wife, or sions, are to be con- of Queen Elizabeth, ight detain against l declared upon the ndant justified the t was said by Man- ught to be allowed and in this case the unt, 500 marks was p).

diamonds and pearls dy, who was a on of England, and w of the king, were the year 1674, Lord raphernalia allowed, ith or marriage (r): eld, in the case of e widow of a com- value of 200*l.* and

for their own persons." pl. 5. op. Husband and Wife, tit. am v. Londonderry, 3 oy Lord Hardwicke. ountess Bindon's case, 3, pl. 201. Hastings v. Sir A. ro. Car. 343. Tyrrell's case, 1 Freeman.

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upwards, as her *bona paraphernalia*. Lord Talbot afterwards allowed the widow of a private gentleman her gold watch, and several gold rings given at the burials of relations (t). And in a case where a Mrs. Northey, in the lifetime of her husband, was possessed of jewels to the value of 3,000*l.* and upwards, which had been bought partly with her own money, and partly her husband's, and had been worn by her whenever she was dressed; Lord Hardwicke held, that she was entitled to them as paraphernalia, and said, that the value made no alteration in the Court of Chancery (u).

The following case, as decided Mich. 5 Geo. I., is reported in Viner's Abridgement (x): Mr. Calmady having a crocheat of diamonds, which was his first wife's, in 1695 makes his Will, and, amongst other things, devises this crocheat to his eldest son, and that it should go in succession to the heir of his family as an heirloom: Afterwards, in 1699, he marries a second wife (the defendant), and turns this crocheat into a necklace, and adds several new diamonds to it to the value of 200*l.*, which was more than the value of the crocheat: The plaintiff, as heir to Mr. Calmady (though not the eldest son to whom it was specifically devised), demands this crocheat of the defendant, the widow of Mr. Calmady: Counsel for the defendant insisted that the defendant was entitled to it as part of her paraphernalia, which the husband cannot give away from his wife by Will, though he may dispose of it in his lifetime, and the wife shall retain it against the devisee or executor of her husband, unless in the case of creditors, who cannot otherwise have a satisfaction of their debts: Counsel for the plaintiff said, that though formerly it was a doubt whether the husband could devise any part of the paraphernalia of the wife, yet of late it has been holden, that the husband may devise specifically jewels of his own which he permitted his wife to wear, though they shall not go to his executor, or to a general residuary legatee,

(t) 2 Eq. Cas. Abr. 156, in marriage.

(u) Northey v. Northey, 2 Atk.

79. (x) Calmady v. Calmady, 11 Vin. Abr. 181, pl. 21.

and that, in this case, there being no direct proof of an express gift to the wife, only a permission to wear them, they are well devised to the heir as an heirloom and that the altering and turning the crocheat into a necklace, and permitting his wife to wear them, was no revocation of the devise: Parker, C., seemed to doubt at first, that turning the crocheat into a necklace, adding new diamonds to it, and permitting his wife to wear it, was a revocation of the devise, but at last ordered the Master to examine and separate the old diamonds from the new, and decreed the diamonds of the crocheat to the plaintiff as heir-at-law, and specifically devised to him as an heirloom.

On the authority of this case it was ruled by Lord Romilly in *Jervoise v. Jervoise* (y), that family jewels, which have been handed down from father to son, do not constitute paraphernalia, notwithstanding they may have been worn by the wife at court and on other full-dress occasions, but that jewels presented to a wife during coverture by a third person, or by her husband for the purpose of ordinary use as befitting her station in life, are properly paraphernalia.

By the custom of London, a citizen's widow may retain some part of her jewels as paraphernalia, but not all (z).

It will make no difference as to the widow's right, that the jewels, &c., were in the custody of the husband, if the wife occasionally wore them (a).

the wife cannot dispose of them by gift or will during her husband's life:

There is an important distinction between gifts of the husband to the wife for her separate use, and gifts by him to her as paraphernalia; for she may dispose absolutely of the things given to her for her separate use; but where the husband gives them to her expressly for the ornament of her person, she cannot, according to our law, dispose of them by gift or Will during his life (b): although by the civil law, the wife had such an absolute property in them that

(y) 17 Beav. 566. But as to those presented to her by a third person, see *post*, p. 679, *contra*.

(z) 11 Vin. Abr. 180, pl. 17.

(a) *Northey v. Northey*, 2 Atk. 79.

(b) *Graham v. Londonderry*, 3 Atk. 394.

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she might alien them *in vitâ mariti, invito marito* (c). But the husband may sell them or give them away in his lifetime (d), although he cannot dispose of them by Will during her life (e).

the husband
may sell them
or give them
away :
but he cannot
devise them :

By the civil law, *bona paraphernalia* in all cases go to the wife, to the exclusion of the executor, nor are they subject to the payment of the husband's debts (f). But by our law they are clearly liable to his creditors, and, therefore, the widow will not be entitled to them (except as far as her necessary apparel) (g) in case of a deficiency of assets (h). Nor are they to be allowed to her, where there are not assets at the time of her husband's death, though contingent assets afterwards fall in; for the same might not have happened until twenty or thirty years after the death of the testator, nor possibly until after the death of the widow, when the end and design of the widow's wearing her *bona paraphernalia*, in memory of her husband, could not have been answered, and, therefore, it was reasonable that this should be reduced to a certainty, viz., that if there should not be assets real and personal at the testator's death, or, at least, at the time when the jewels were applied to debts, then the jewels should be liable (i).

they are
subject to the
debts of the
husband :

(c) Cro. Car. 344, by Berkeley and Jones, Justices. 3 Bac. Abr. 66. Executors (H. 4).

(d) Graham v. Londonderry, 3 Atk. 394.

(e) Cary v. Appleton, 1 Cas. Chan. 240. Godolph. Pt. 2, c. 15, s. 1. Tipping v. Tipping, 1 P. Wms. 730. Northey v. Northey, 2 Atk. 78, 79. Seymour v. Tresilian, 3 Atk. 358. 2 Black. Comm. 436. This was denied by Richardson, C.J., and Cooke, J., in Lord Hastings v. Douglas, Cro. Car. 345, though agreed to by Berkeley and Jones, Justices; and Harcourt, C., reserved the consideration of the point in Wilcox v. Gore, 11

Vin. Abr. 180, 181. See also Calmady v. Calmady, *ibid.* 181 : ante, p. 675, and 3 Bac. Abr. 66. Executors (H. 4), where the husband's power to dispose of them by Will is asserted.

(f) Swinb. Pt. 6, s. 7, pl. 5. Godolph. Pt. 2, c. 15, s. 1.

(g) Noy's Maxims, c. 49, 2 Black. Comm. 436.

(h) Campion v. Cotton, 17 Ves. 264. "It is not fit," said Lord Keeper Finch, "that the widow should shine in jewels and the creditors starve:" Lady Tyrrell's case, 1 Freem. 304.

(i) Burton v. Pierpont, 2 P. Wms. 79.

but not to his
legacies :

the widow is
entitled to
marshal the
assets against
the heir :

and against a
devisee in
trust :

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against a
devisee :

But the widow's claim to her paraphernalia is preferred to that of a legatee of her husband, and, therefore, they will not be liable to satisfy the testator's legacies, or any of them (*k*), either general or specific (*l*).

Likewise, where a creditor has a double fund, the widow's claim to paraphernalia shall not be disappointed by the effect of his option of resorting to the personal estate (*m*). Therefore, if the personal estate, including the paraphernalia, had been exhausted in payment of specialty creditors, the widow, in equity, stood in their place as to so much upon the real assets of the heir-at-law (*n*). So where there is a real trust estate, charged with the payment of the husband's debts, the wife may resort to the trust to be reimbursed to the value of her paraphernalia, if the personal estate has been exhausted by her husband's creditors (*o*). So a real estate, charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia (*p*).

But whether the widow shall stand in the place of creditors for the amount of her paraphernalia against real assets *devised*, unless in trust for payment of debts, appears doubtful (*q*). According to Lord Hardwicke's decisions in *Ridout v. Plymouth* (*r*), and *Probert v. Morgan* (*s*), she is not so entitled; but the case of *Tynt v. Tynt* (*t*) is at variance

(*k*) *Snelson v. Corbet*, 3 Atk. 370.

(*l*) In *Graham v. Lord Londonderry*, 3 Atk. 395, Lord Hardwicke said that the right of the wife was superior to that of any legatee.

(*m*) *Aldrich v. Cooper*, 8 Ves. 397.

(*n*) *Snelson v. Corbet*, 3 Atk. 369. See also *Tipping v. Tipping*, 1 P. Wms. 729. *Tynt v. Tynt*, 2 P. Wms. 544.

(*o*) *Incedon v. Northcote*, 3 Atk. 438.

(*p*) *Boyntun v. Boyntun*, 1 Cox, 106.

(*q*) See Cox's note to *Tynt v. Tynt*, 3 P. Wms. 544. It has been suggested by an able writer (Joshua Williams on Real Assets, p. 118), that since the stat. 3 & 4 Will. 4, c. 104, she may marshal the assets in this case also; because she is, as to her paraphernalia, in a position similar to that of a simple contract creditor, who, by force of that statute, may come upon any part of the property of the deceased.

(*r*) 2 Atk. 105.

(*s*) 1 Atk. 440.

(*t*) 2 P. Wms. 542, before the Master of the Rolls, 1729.

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with those decisions. It seems, however, that if the devised estate be subject to a mortgage, or other specific incumbrance, she would have a right to marshal the assets by throwing the charge upon the estate, as a legatee might in such a case (u).

It has already appeared that the husband may alien the wife's paraphernalia in his lifetime; but if the alienation be not absolute, but as a pledge or security for money, the wife surviving him will be entitled to have them redeemed by his executors out of her husband's personal estate, if sufficient for that purpose, after payment of his debts (x).

The widow may bar her right to paraphernalia by settlement before marriage: as in *Cholmely v. Cholmely* (y), where the wife by her marriage articles agreed to have no part of her husband's personal estate, but what he should give her by Will; and this was held to bar her of her paraphernalia (z).

If the husband should bequeath to his wife all household goods, furniture, plate, *jewels*, linen, &c., for life or widowhood, with the remainder over, this will not bar her of her paraphernalia (a). But in such a case if the widow does not, by some act in her lifetime, manifest her election to take them by her elder and better title, her executor or administrator cannot lay any claim to them after her decease (b).

Paraphernalia are in their nature materially distinct from gift of jewels, &c., to the wife, by third persons, for *her separate use*: as the latter may be aliened by the wife in the lifetime of the husband, and are not liable to his debts. With respect to what shall be considered as given to her separate use; where some diamonds had been presented to the wife

if the husband pawn the paraphernalia, his executors must redeem them for the widow:

the widow barred of her paraphernalia by marriage articles:

by election to take them as legatees.

Jewels, &c., given for the separate use of the wife by third persons, not liable to husband's debts:

(u) *Oneal v. Mead*, 1 P. Wms. 693. 2 *Roper*, Husband and Wife, 148, note (a) by Jacob. See *post*, Pt. IV. Bk. I. Ch. II. §§ I. & II. (z) *Graham v. Londonderry*, 3 Atk. 395.

(y) 2 Vern. 83.

(z) *Read v. Snell*, 2 Atk. 642.

(a) *Marshall v. Blew*, 2 Atk. 217.

(b) *Clarges v. Albemarle*, 3 Vern. 247.

by the husband's father, on her marriage with his son, they were considered by Lord Hardwicke as a gift to the separate use of the wife, and to which she was entitled in her own right (c). So where certain pieces of plate were given to the wife immediately after marriage, by the husband's father, Lord Hardwicke decided that they were to be considered as gifts to the wife for her separate use (d). And a present by a stranger to the wife during coverture must be construed as a gift to her separate use: as where the Regent of France delivered to the husband, as a present for his wife, his picture set about with diamonds (e).

secus, of jewels presented by the husband before marriage in cases to which the M. W. P. Act does not apply.

But with respect to jewels, &c., presented to the wife by the husband himself before marriage, there was before the Married Women's Property Act no exemption from the liability to his creditors: for immediately on the marriage, the law gave them to the husband, and he could not be considered as a trustee for them for her separate use afterwards (f).

As we have already seen any woman married since the Married Women's Property Act is entitled to hold and dispose of, in the same manner as if she were a *feme sole*, as her separate property, all personal property whensoever and from whomsoever she may acquire it, and her husband has no interest in such property, nor is such property liable to his creditors.

(c) *Graham v. Londonderry*, 3 Atk. 393.

(d) *Brinkman v. Brinkman*, 3 Atk. 394, cited in *Graham v. Londonderry*.

(e) 3 Atk. 393. Lord Hardwicke in this case mentioned the case of Countess Cowper, in which several trinkets (which it is presumed, were not intended to be

worn, like paraphernalia, as ornaments to her person) had been given to her by Lord Cowper himself in his lifetime, and they were held by Sir Joseph Jekyll to be her separate estate. See also this case again noticed by his Lordship, in 1 Atk. 271. *Ante*, p. 668.

(f) *Ridout v. Lord Plymouth*, 2 Atk. 105.

SECTION IV.

Of Donations Mortis Causâ.

It will be proper to close the subject of the estate of an executor or administrator in the chattels personal of the deceased in possession, by considering another species of interest in the property of the deceased, which vests neither in the personal representative, nor in his heir, nor in his widow. This is called a *Donatio Mortis Causâ*, and is thus defined in the civil law, from which both the doctrine and the denomination are borrowed: *Mortis causâ donatio est, quæ propter mortis fit suspitionem; cum quis ita donat, ut si quid humanitûs ei contigisset, haberet is, qui accepit; sin autem supervixisset is, qui donavit, reciperet; vel si eum donationis pœnituisse; aut prior decesserit is, cui donatum sit (g).*

To constitute a *donatio mortis causâ*, there must be three attributes: 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the donor by his existing disorder. 3. There must be a delivery of the subject of the donation.

1. The gift must be made with a view to the donor's death (h). If a gift be not made by the donor in peril of

Attributes of a
donatio mortis
causâ:

1. The gift
must be made
by the donor

(g) Inst. lib. 2, tit. 7. The correctness of this definition, and the inaccuracy of that given by Swinbourne, Pt. 1, c. 7, pl. 2, is noticed by Lord Loughborough, in *Tate v. Hilbert*, 2 Ves. 119. The description of a *donatio mortis causâ* given by Lord Cowper, is, "where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his Will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him;

this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him:" *Hedges v. Hedges*, Prec. Chanc. 269.

(h) *Duffield v. Elwes*, 1 Bligh, N. S. 530. The evidence must be clear that the donor gave it in contemplation of death. The burden of proof is necessarily on the donee, and no case ought to prevail unless it is supported by evidence of the clearest and most unequivocal character. *Cosnahan v. Grice*, 15 Moo. P. C. 215.

in peril of
death.

death, *i.e.* with relation to his decease by illness affecting him at the time of the gift, it cannot be supported as a donation *mortis causâ* (i). Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death (k), and in the donor's last illness (l).

2. The gift
must be con-
ditioned to
take effect
only on the
death of
donor.

2. The gift must be conditioned to take effect only on the death of the donor by his existing disorder (m). But, although it is an essential incident to a donation *mortis causâ* that it be subject to a condition, that, if the donor live, the thing shall be restored to him, yet it is not necessary that the donor should expressly declare that the gift is to be accompanied by such a condition: for if a gift be made during the donor's last illness, the law infers the condition that the donee is to hold the donation only in case the donor die of that indisposition (n). Thus in *Gardiner v. Parker* (o), A., being confined to his bed, gave to B. a bond for 1800*l.* two days before his death, in the presence of a servant, saying, "There, take that, and keep it:" The question was between the donee and executors of A.: And Sir John Leach, V.-C., decided in favour of the donation, observing that the doubt originated in the donor not having expressed that the bond was to be returned if he recovered: but that the bond being given in the extremity of sickness, and in contemplation of death, the intention of the donor was to be inferred that the bond shall be holden

(i) *Tate v. Hilbert*, 2 Ves. 121. *Gardiner v. Parker*, 3 Madd. 185. See also *Edwards v. Jones*, 1 Myln. & Cra. 236. *Post*, p. 683.

(k) *Gardiner v. Parker*, 3 Madd. 184.

(l) 1 *Rop. Leg.* 21, 3rd edition. In *Blount v. Burrow*, as reported in 1 Ves. 546, *Eyre, C.B.*, seems to be of opinion, that there must be positive evidence that the gift

was made in the last illness: but this *dictum* is not found in the report of the case in 4 Bro. C.C. 72, and does not seem supported by any other authorities.

(m) *Irons v. Smallpiece*, 2 Barn. & Ald. 553. *Tate v. Leithend, Kay*, 658. *Staniland v. Willott*, 3 Mac. & G. 664, 675.

(n) 1 *Rop. Leg.* 4, 3rd edit.

(o) 3 Madd. 184.

Ch. II. § IV.] *Of Donations Mortis Causâ.*

as a gift only in case of his death; and that if a gift be made in the expectation of death, there is an implied condition that it is to be held only in the happening of that event.

Still, if from all the circumstances of the gift, there is sufficient evidence to rebut the ordinary presumption, and to make it appear that the gift was unconditional, it cannot be supported as a donation *mortis causâ* (p). Accordingly in *Edwards v. Jones* (q), Mary Custance, the obligee of a bond given in the year 1819, for 300*l.*, signed the following indorsement not under seal, on the bond, five days before her death: "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon; as witness my hand, this 25th day of May, 1830;" Immediately after the indorsement had been signed, Mary Custance delivered the bond, or caused it to be delivered, to Esther Edwards, and it remained in her hands: Mary Custance died on the 30th of May, 1830, having in the year 1829 made her Will, in which she did not mention the bond, or dispose of the residue of her estate, but she appointed an executor: It was argued on the part of Esther Edwards that if this gift could not be established as a *donatio inter vivos*, by reason of the act being incomplete, it might still take effect as a *donatio mortis causâ*: But Lord Chancellor Cottenham held, that in order to be good as a *donatio mortis causâ*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's decease; and that if it appeared from the circum-

(p) See *Walter v. Hodge*, 2 (q) 1 Mylne & Crm. 226.
Swanst. 92.

stances of the transaction, that the donor intended to make an immediate and irrevocable gift, that would destroy the title of the party who claimed as a donee *mortis causâ*; His Lordship further observed, that a party making a *donatio mortis causâ* does not part with the whole interest, save only in a certain event, and it is of the essence of such a gift, that it shall not otherwise take place: Such a donation leaves the whole title in the donor, unless the event occurs which is to divest him: Here, however, there was an actual assignment, by which the donor, Mrs. Custance, transferred all her right, title, and interest to her niece; which was in itself sufficient to exclude the possibility of treating this as a *donatio mortis causâ*.

3. There must be a delivery of the subject of donation:

8. There must be a delivery of the subject of the donation. The general rule upon this head is, that to substantiate the gift, there must be an *actual* tradition or delivery of the thing to the donee himself (*r*), or to some one else for the donee's use (*s*). The possession of it must be transferred in point of fact. The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself or by his order. Thus, in *Bunn v. Markham* (*t*), Sir G. Clifford had written upon the parcels containing the property in question the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees: It was, therefore, manifestly his intention that it should pass to them: yet as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift.

what constitutes a delivery:

A further requisite to give effect to the donation is, that the deceased should, at the time of the delivery, not only part with the possession, but also with the dominion over the subject of the gift (*u*). Thus, in *Reddell v. Dobree* (*x*),

(*r*) Ward v. Turner, 2 Ves. Sen. 404.
431. Irons v. Smallpiece, 2 B. & A. 553. Powell v. Hellicar, 26 Beav. 261.

(*t*) 7 Taunt. 231.

(*u*) Hawkins v. Blewitt, 2 Esp. N. P. C. 663.

(*s*) Drury v. Smith, 1 P. Wms.

(*x*) 10 Sim. 244.

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id gift.

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e delivery, not only
the dominion over
Reddell v. Dobree (x),

unt. 231.
v. Blewitt, 2 Esp.
63.
im. 244.

A., the deceased, being in a declining state of health, delivered to Charlotte R. a locked cash-box, and told her to go at his death to his son for the key; and that the box contained money for herself, and entirely at her disposal after he was gone, but that he should want it every three months whilst he lived: The box was twice delivered to the deceased by his desire, and he delivered it again to Charlotte R., and it was in her possession at his death: The box was afterwards broken open by her, and contained a cheque for 500*l.*, drawn by a third party in favour of the deceased, and enclosed in a cover, indorsed with the name of Charlotte R., and the key (which the son of the deceased had refused to deliver to her) had a piece of bone attached to it, with her name written on it: Sir L. Shadwell, V.-C., held that there was no *donatio mortis causâ*; for that there was nothing more than that to a certain extent the deceased put Charlotte R. in possession of the box, but retained to himself the absolute power over the contents.

the deceased
must part
with the
dominion as
well as the
possession:

But it is no objection that the gift was not made to the donee free from incumbrance, but charged with the performance of a particular purpose (y). Accordingly it was held in the case of *Hills v. Hills* (z), that a gift may be good as a *donatio mortis causâ*, although it be coupled with a trust that the donee shall provide for the funeral of the donor.

but a trust
may be
annexed to
the gift:

Again, though a delivery to a third party for the donee's use may be good (a), yet a mere delivery to an agent, in the character of agent for the giver, is not sufficient (b).

a delivery to
some one else
as agent for
the donor, is
insufficient:

But there are cases where the nature of the thing will not admit of a corporeal delivery; and then, it should seem, that a delivery of the means of coming at the possession or making use of the thing given will be sufficient (c). Thus the delivery of the key of a trunk has been decided to

what is a
sufficient
delivery when
the subject is
incapable of
actual
transfer:

(y) *Blount v. Burrow*, 4 Bro. C. C. 75. See *Hambrooke v. Simmons*, 4 Russ. Ch. C. 25.
(z) 8 M. & W. 401.
(a) See *supra*, note (a).
(b) *Farquharson v. Cave*, 2 Coll. 356.
(c) *Ward v. Turner*, 2 Ves. Sen. 441.

amount to the delivery of a trunk and its contents (*d*). So the delivery of the key of a warehouse or other place, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for the purpose of a *donatio mortis causâ* (*e*). But in these cases it is to be observed, that the key is not to be considered in the light of a symbol, in the name of the thing itself; but the delivery of it has been allowed as the delivery of the possession, because it is the way of coming at the possession or to make use of the thing (*f*).

there may be
a *donatio
mortis causâ*
of bank notes:
or of other
negotiable
instruments
which pass by
delivery:

Bank notes may be the subject of *donatio mortis causâ*, because the property is transferred by the delivery (*g*). And on the same principle it should seem that all negotiable instruments which require nothing more than delivery to pass to the donee the money secured by them, may be the subjects of donations *mortis causâ*. Since it has been so adjudged of bank notes, there appears no reason why exchequer notes or promissory notes, payable to the bearer, or bills of exchange, or exchequer bills, indorsed in blank should not have the capability: for in all those cases the property passes to the donee by delivery (*h*).

(*d*) Jones v. Selby, Prec. Chan. 300. Ward v. Turner, 2 Ves. Sen. 441. *Re* Mustapha, Times L. R., viii., 160.

(*e*) Ward v. Turner, 2 Ves. Sen. 443. Smith v. Smith, 2 Stra. 955.

(*f*) Ward v. Turner, 2 Ves. Sen. 443. Bunn v. Markham, 7 Taunt. 224.

(*g*) Miller v. Miller, 3 P. Wms. 356.

(*h*) 1 Rep. Leg. 16, 3rd edition. Unendorsed negotiable instruments payable to order may be the subject of a *donatio mortis causâ*. Thus, a promissory note payable to order may be the subject of a *donatio mortis causâ*, and will pass thereby though unendorsed

by the donor: Veal v. Veal, 27 Beav. 303. See also Rankin v. Weguelin, 29 L. J., Ch. 323, note. This was expressly followed in the case of *Re Mead*, 15 C. D. 651, in which a testator shortly before his death gave to his wife two bills of exchange which were payable to himself or order: they did not fall due until after his death, and they had not been endorsed by him. It was held that there had been a valid *donatio mortis causâ* of the bills. A cheque payable to the donor or order, and without having been endorsed by him, given by the donor during his last illness to his son, stands on the same footing as

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So a bond may be a subject of *donatio mortis causâ*,
because the property is considered to pass by the delivery (i).

It has been a matter of considerable discussion, whether a mortgage can be the subject of a *donatio mortis causâ* by delivery of the mortgage deeds: but the question may now be regarded as settled in the affirmative by the decision of the House of Lords in *Duffield v. Hicks* (k), reversing the decision of Sir J. Leach, who had held that there was no good *donatio mortis causâ* by the delivery of mortgage deeds. But on appeal to the House of Lords, their Lordships held that the property in the deeds and the right to recover the money secured by them, passed by the delivery, followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee to make the gift effectual. The decree of his Honour was accordingly reversed (l).

or of a mort-
gage deed :

And in the case of *Witt v. Amis* (m), the Court of Queen's or of a policy
of insurance :

a promissory note or bill of exchange payable to the donor or order: *Clement v. Cheesman*, 27 C. D. 631. As to whether in such a case the donee must sue in the name of the donor's executor or whether he can compel the executor to endorse to him as if he had given value, 45 & 46 Vict. c. 61, s. 31 (4), *Quere*. See Chalmers on Bills of Exchange, 3rd edit., p. 119. But the ground on which unendorsed negotiable instruments may be the subject of a *donatio mortis causâ* is not that a property is transferred at law by delivery, but that the property is so transferred by the delivery of the instrument as to give a title to the donee to the assistance of a Court of Equity to make the donation complete. It is in accordance with the principles laid down in the decision in the House of

Lords in *Duffield v. Hicks*, 1 Bligh, N. S. 498, that unendorsed negotiable instruments have been held to be the subject of a *donatio mortis causâ*. At one time, however, a contrary opinion seems to have prevailed. See *Miller v. Miller*, 3 P. Wms. 356, and *Tate v. Hilbert*, 2 Ves. 111.

(i) *Ashton v. Dawson*, 2 Coll. 363, n. (c). *Snellgrove v. Baily*, 3 Atk. 214. *Ward v. Turner*, 2 Ves. Sen. 441, 442. *Gardiner v. Parker*, 3 Madd. 184, *ante*, p. 682. But such a donation cannot be regarded as a satisfaction of a debt due from the donor to the donee: *Clavering v. Yorke* (reported in a note to 2 Coll. 363).

(k) 1 Bligh (N. S.) 498.

(l) See also *Staniland v. Willott*, 3 Mac. & G. 676.

(m) 1 Best & Sm. 109.

or of a
banker's
deposit note :

but not of
receipt for
stock :

Notes drawn
by the
deceased in
his last
illness : not
the subject of
*donatio mortis
causâ*, nor
(generally
speaking)
cheques on
bankers :

Bench held, that there was no distinction between a policy of insurance and a mortgage or bond, as regards its capability of being made the subject of a *donatio mortis causâ*, and, therefore, that a policy may be the subject of a gift of that nature. This decision was adopted by Romilly, M.R. (*n*), who held also to the same effect as to money due on a banker's deposit note (*o*).

But where no property, legal or equitable, is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis causâ*. Thus in *Ward v. Turner* (*p*), Lord Hardwicke held that the delivery of receipts for South Sea annuities was not such a delivery of the annuities themselves as to support the gift of them as a *donatio mortis causâ* : but he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation (*q*).

A promissory note made by a man in his last illness, cannot operate as a *donatio mortis causâ* to the payee (*r*), for it has not that reference to the death of the donor which is essential to such a gift (*s*). The same has been decided as to a cheque on a banker ; which is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor ; so that is (generally speaking) alto-

(*n*) *Amis v. Witt*, 33 Beav. 619.

(*o*) See *Accord*, *Moore v. Moore*, L. R. 18 Eq. 474. *Re Dillon*, 44 C. D. 76. See further *Moore v. Darton*, 4 De G. & Sm. 517, in which case a receipt had been given by a borrower to a lender as follows : "Received of D. £500, to bear interest at 4 per cent. per annum." And *Knight-Bruce, V.-C.*, held that the delivery of this receipt to an agent of the borrower by the lender on his death bed stating that he wished the debt to be cancelled was a sufficient *donatio mortis causâ*, on the ground, *semble* that the docu-

ment was essential to the proof of the contract of loan.

(*p*) 2 Ves. Sen. 431.

(*q*) Railway stock cannot be the subject of *donatio mortis causâ*. *Moore v. Moore*, L. R. 18 Eq. 474.

(*r*) *Tate v. Hillbert*, 2 Ves. 111. *Holliday v. Atkinson*, 5 B. & C. 501. In the latter of these cases Lord Tenterden expressed his opinion that the intention to avoid the legacy duty would not be a sufficient consideration for a promissory note ; for then the note would not be payable till after the donor's death : *ib.* 503.

(*s*) See *ante*, pp. 681, 532.

gether inconsistent with the nature of a donation *mortis causâ* (t).

(t) *Tate v. Hilbert*, 2 Ves. 120. See also *Tate v. Leithead, Kay*, 638. *Ante*, p. 682. However, a cheque under some circumstances has been considered the subject of a *donatio mortis causâ*: as where the testator in his illness drew a bill on a goldsmith for the payment of a sum to A. the wife of B., and delivered it to A. with a written indorsement to buy her mourning: *Lawson v. Lawson*, 1 P.Wms. 441. (But see the remarks of Lord Loughborough in 2 Ves. 121.) So in *Bouts v. Ellis*, 17 Beav. 121 (affirmed on appeal, 4 De G. M. & G. 249), a testator, four days before his death, said to his wife, "I am a dying man; you will want money before my affairs are wound up." On the following day he gave his wife a crossed cheque, and on the next day but one, remembering that it was crossed, he asked a friend who visited him to take it and give the wife another for it, which the friend did: The testator's cheque was paid before, and the other cheque after his death: And it was held by Romilly, M.R., and by the Lords Justices, that the transaction constituted a good *donatio mortis causâ*. But the delivery of the donor's cheque on his banker, which was not presented before the donor's death, was held not a good *donatio mortis causâ*: *Hewitt v. Kaye*, L. R. 6 Eq. 198. Where the delivery by a donor, in his last illness, of a cheque on his bankers was accompanied by a delivery of his banker's pass-book, and the cheque was not

presented until after the donor's death, it was held by Bacon, V.-C., that the gift was not a good *donatio mortis causâ*: *Re Beak's Estate*, L. R. 13 Eq. 734. *Re Mead*, 15 C. D. 651. Where a cheque was given by A. to B., and presented without delay, and the bankers had sufficient assets of A., but refused payment because they doubted the signature, and the next day A. died, the cheque not having been paid, it was held to be a complete gift *inter vivos* of the amount of the cheque: *Bromley v. Brunton*, L. R. 6 Eq. 275. See also *Rolls v. Perce*, 5 C. D. 730, where a cheque drawn by a testator payable to his wife or her order, and indorsed by her and paid into a foreign bank against the amount of which she drew, was held to be a good *donatio mortis causâ*, although it was not presented for payment at the bank on which it was drawn until after the testator's death. The result of the cases on the question how far the gift of a cheque of the donor can be the subject of a *donatio mortis causâ* would seem to be that the mere delivery of a cheque which is not paid in the donor's lifetime does not constitute a *donatio mortis causâ*, for it is payment which constitutes the necessary delivery: *Hewitt v. Kaye*, L. R. 6 Eq. 198. *Re Beak's Estate*, L. R. 13 Eq. 734. Whereas in the case of a bill, promissory note, bond, I O U, or cheque of a third person, it is the delivery of the instrument itself which operates as a delivery

How a *donatio mortis causâ* differs from a legacy.

1. Probate unnecessary :

2. Executor's assent unnecessary.

How it differs from a gift *inter vivos* :

1. It is revocable :

It may now be expedient to examine in what respects a *donatio mortis causâ* differs from a legacy, and from a gift *inter vivos* ; whence it will appear how important the distinction is between these three kinds of donations.

A *donatio mortis causâ* differs from a legacy in these respects. 1. Probate of it is unnecessary, for such a gift takes effect from delivery ; so the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act (*u*). 2. For the reason just given, no assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee (*x*). In fact the distinction between a *donatio mortis causâ*, and a legacy under a nuncupative Will, is, that the former is claimed against the executor, and the other, from the executor (*y*).

A *donatio mortis causâ* differs from a gift *inter vivos*, in these respects (*y*), in which it resembles a legacy : 1. It is

of the money secured by it. It is to be observed in the case of *Bouts v. Ellis* (*ubi sup.*), that the cheque was paid before the death of the donor, and in *Lawson v. Lawson* (*ubi sup.*), the gift by delivery of the bill was in the nature of an appointment. Generally, the giving of a cheque will not operate as an appropriation *inter vivos* in favour of the donee (*Hopkinson v. Forster*, L. R. 19 Eq. 74), although in *Bromley v. Brunton* (*ubi sup.*), it was held on the facts of that case that there was a complete gift *inter vivos* of the amount of the cheque. There seem, however, to be some cases in which the delivery of a cheque which is not paid in the donor's lifetime is allowed to operate as a *donatio mortis causâ*. One of them would seem to be the case where the cheque is in the lifetime of the donor negotiated or paid away by the donee for valuable consideration : *Rolls v.*

Pearce, 5 C. D. 730, or where the money is received immediately after the death of the testator before the banker was apprized of it : *Tate v. Hilbert*, 2 Ves. 111. But the gift would in these cases seem to be validated rather as a mere donation than as a *donatio mortis causâ*.

(*u*) 1 Rep. Leg. 12, 3rd edition. *Rigden v. Vallier*, 2 Ves. Sen. 258

(*x*) *Tate v. Hilbert*, 2 Ves. 120.

(*y*) There was formerly another point in which a *donatio mortis causâ* differed from a gift *inter vivos*, viz., that it might be made to the wife of the donor. This difference no longer exists, as since the M. W. P. Act, 1882, a married woman can receive and hold as her separate property any gift made to her, whether by her husband or any other person. As to former law, see *Lawson v. Lawson*, 3 P. Wms. 356. *Tate v. Leithead*, Kay, 658.

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3 P. Wms. 356. Tate v.
Kay, 658.

ambulatory, incomplete and revocable during the testator's
life. The revocation may either be affected by the recovery
of the donor from his disorder (z), or by resumption of the
possession of the subject (a). But he cannot revoke the
donation by a subsequent Will: for, on the death of the
donor, the title of the donee becomes, by relation, complete
and absolute from the time of delivery (b). It may, however,
be satisfied by a legacy given to the donee (c). 2. It is
liable to the duties imposed on legacies, by the express pro-
visions of the stat. 8 & 9 Vict. c. 76, s. 4, which enacts that
every gift which shall have effect as a donation *mortis causâ*
shall be deemed a legacy within the meaning of those
Acts (d). 3. It is liable to the debts of the testator upon
deficiency of assets (e).

2. Liable to
legacy duty :
Stat. 8 & 9
Vict. c. 76,
s. 4.

3. To debts.

In *Hayslep v. Gymer* (f), an action of debt was brought
for money had and received to the use of the plaintiff :
It appeared that the defendant was executor of a Mrs. Wil-
kinson, and the plaintiff lived in Mrs. Wilkinson's house till
the time of her death : On the reading of Mrs. Wilkinson's
Will, the defendant asked the plaintiff whether she had not
possession of something given to her by Mrs. Wilkinson, and
how she had obtained it : She produced a parcel, which con-
tained bank notes of the value of 220*l.*, and said that Mrs.
Wilkinson had given them to her a fortnight before her death,
telling her they would be useful to her, after her (Mrs. Wil-
kinson's) death ; and that no one was present at the time :

Evidence of a
donatio mortis
causâ.

(c) *Ante*, p. 682.

(a) *Ward v. Turner*, 2 Ves. Sen.
433. *Bunn v. Markham*, 7 Taunt.
232, by Gibbs, C.J.

(b) *Jones v. Selby*, Prec. Chanc.
300.

(c) *Jones v. Selby*, Prec. Chanc.
300. See *Johnson v. Smith*, 1 Ves.
Sen. 314.

(d) And by 44 Vict. c. 12,
§ 38 (2), amongst the personal

property to be included in the
account on which probate duty is
payable is "any property taken as
"a *donatio mortis causâ* made by
"any person dying on or after
"1 June, 1881."

(e) *Smith v. Casen*, mentioned
in *Drury v. Smith*, 1 P. Wms.
406. *Ward v. Turner*, 2 Ves. Sen.
434.

(f) 1 Adol. & Ell. 162.

According to one witness, the defendant then said that he should keep the parcel till the plaintiff required it: according to another, simply that he should keep it: The plaintiff had Mrs. Wilkinson's keys during her illness, and superintended the economy of the house: other property of Mrs. Wilkinson's to a considerable amount was shown to have been in the power of the plaintiff, which was found by the executors undisturbed: Mrs. Wilkinson did not take to her bed more than a week before her death: During that week the plaintiff showed the notes, in her own possession, to a witness: The action was brought to recover back these notes: The defendant's counsel objected that there was not evidence to go to the jury, of the property of the notes being in the plaintiff: The Judge having left the whole evidence to the jury, they found a verdict for the plaintiff: A motion was afterwards made to enter a nonsuit, because there was no evidence at all of property in the notes, except the plaintiff's own account of the matter: But the Court of K. B. refused to disturb the verdict, on the ground that there was some evidence to go to the jury, though slight, and that the declaration made by the plaintiff herself was admissible evidence in her favour by reason of acquiescence (though of trifling weight) in its truth by the defendant, and also as being part of the *res gestæ*, on the occasion of the defendant's obtaining the notes (*g*).

*Donatio mortis
causæ* not
abolished by
Wills Act.

It may be added in conclusion that the Wills Act (1 Vict. c. 26) has not, either in words or in effect, abolished such donations (*h*).

(*g*) In this case Littledale and Parke, J.J., expressed their opinion that it made no difference whether the delivery of the notes was a gift

absolutely, or a *donatio mortis causæ*.

(*h*) *Moore v. Darton*, 4 De G. & Sm. 517.

BOOK THE THIRD.

OF THE QUANTITY OF THE ESTATE IN ACTION OF AN
EXECUTOR OR ADMINISTRATOR.

HITHERTO the subject as to the quantity of the estate of an executor or administrator has been confined to personal property of the testator or intestate *in possession*; that is, where he had not only the right to enjoy, but had the actual enjoyment of the thing. But property in chattels personal may also be in *action*; that is, where a man has not the occupation, but merely a right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action, from whence the thing so recoverable is called a thing, or *chose in action*.

Thus, if a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose in action*; for though the right to recover a recompense vests in me at the time of the damage done, yet there is no possession of it till recovered by course of law (*a*).

By the term *Chose in Action*, as used in this Treatise, is to be understood a right to be asserted, or property reducible into possession, either by action at law, or suit in equity (*b*).

(a) 2 Black. Comm. 397.

(b) A testator bequeathed a leasehold estate to trustees, upon trust as therein mentioned; and first, he charged the estate with the payment of an annuity to his daughter during all his interest in the estate: The daughter afterwards mortgaged her annuity, first to A. and afterwards to B.; but B. gave the trustees notice of his

mortgage before A. did: And it was held by Sir L. Shadwell, V.-C., that the annuity was a chattel interest in equity and not a *chose in action*, nor subject to any of the rules established with regard to assignment of *chooses in action*; and consequently that B. had not gained any priority over A.: Wiltshire v. Rabbits, 14 Sim. 76.

The object of the present Book will be to investigate what *choses in action* the estate of an executor or administrator comprises: and the subject may perhaps be separated conveniently into these four divisions; 1st, to what *choses in action* an executor or administrator is entitled, which the deceased himself might have put in suit. 2ndly, As to the right of an executor or administrator to *choses in action*, where the action accrues after the death of the testator or intestate. 3rdly, As to the title of an executor or administrator to the executory and contingent interests of the deceased. 4thly, What suits, commenced by the testator or intestate, may be continued by the executor or administrator.

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CHAPTER THE FIRST.

TO WHAT CHOSSES IN ACTION THE EXECUTOR OR ADMINIS-
TRATOR IS ENTITLED, WHICH THE DECEASED MIGHT HAVE
PUT IN SUIT.

It may be advisable to treat of the subject of this Chapter in two subdivisions; 1st, The general question as to what actions survive to the executor or administrator; 2ndly, Particular instances where the executor or administrator is entitled to *Choses in Action*, which the deceased might have put in suit, and where not.

SECTION I.

The General Question as to what Actions survive to the Executor or Administrator.

With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other *duty*, the general rule has been established from the earliest times; that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor or administrator (*a*). Therefore, it is clear that an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts of record, as judgments, statutes, or recognizances, or debts due on special contracts, as for rents; or

All personal
actions
founded on
contract or
duty, &c.,
survive:

(a) 1 Saund. 216, a. n. (1) to administrators, by stat. 31 Edw. III.
Wheatley v. Lane. The right of a. 1, c. 11.
executor to sue is extended to ad-

on bonds (*b*), covenants, and the like, under seal; or debts on simple contracts, as notes unscaled, and promises not in writing, either express or implied (*c*). It is true that no action of account lay for an executor at common law, upon the principle that the account rested in the privity and knowledge of the testator only (*d*); but this action is since given to executors by the statute of Westm. 2 (13 Edw. I. stat. 1, c. 23), to executors of executors by 25 Edw. III. stat. 5, c. 5, and to administrators by 31 Edw. III. stat. 1, c. 11. So if the goods, &c., of the testator taken away continue in specie in the hands of the wrongdoer, it has been long decided that replevin and detinue will lie for the executor to recover back the specific goods, &c. (*e*); or in case they are sold, an action for money had and received to recover the value (*f*). So the executor of an assignee of a bail-bond might have brought an action upon it; for it was an interest vested which went to the executor (*g*).

how far the executor represents the testator in his contracts :

The executor or administrator is the only representative of a deceased that the law will regard in respect of his personalties, and no word introduced into a contract or obligation can transfer to another his exclusive rights derived from such representation.

representation of deceased by executor or administrator complete.

The representation of the deceased, in matters of contract, by his executor or administrator is so complete, that, generally speaking, it is not necessary, in order to transmit to the executor or administrator a right of enforcing a contract, that he should be named in the terms of it. Thus if money be payable to B., without naming his executor, yet

(*b*) A Scotch heritable bond, although it contain a personal obligation to pay the debt, descends to the heir-at-law : *Jerningham v. Herbert*, 4 Russ. Chanc. Cas. 388. *Allen v. Anderson*, 5 Hare, 163. See also *Cust v. Goring*, 18 Beav. 383.

(*c*) Wentw. Off. Ex. 159. 14th edit. Com. Dig. Administration,

(B.). Toller, 157.

(*d*) Co. Litt. 89, b. 2 Inst. 404.

(*e*) *Le Mason v. Dixon*, Sir W. Jones, 173, 174. 1 Saund. 217, note (1).

(*f*) 1 Saund. 217, note (1).

(*g*) *Nott v. Stephens*, Fortesc. 367. Com. Dig. Administration (B. 13).

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a respect of his per-
p a contract or obli-
usive rights derived
matters of contract,
complete, that, gene-
order to transmit to
of enforcing a con-
terms of it. Thus if
ng his executor, yet

ller, 157.
Litt. 89, b. 2 Inst.
Mason v. Dixon, Sir W.
3, 174. 1 Saund. 217,
saund. 217, note (1).
t v. Stephens, Fortesc.
n. Dig. Administration

his executor or administrator shall have an action for it (*h*).
So if money be payable to A., or his assigns, his executor
shall take it: for he is assignee in law (*i*). But if one
enters into an obligation, conditional to pay 20*l*. to such
person as the testator shall by his last Will appoint, and the
testator makes no particular appointment; his executors
cannot maintain an action for this 20*l*.: for though they are
his assignees in law, yet the assignee here must be an
assignee in deed (*k*). So if an annuity be given to B. without
saying to his executors and administrators, during the life of
the testator's wife, upon condition that he be civil to the wife,
and B. dies before the wife, his executor shall not have it;
for it was personal to B. (*l*).

But it was a principle of the common law, that if an
injury was done either to the person or property of another,
for which damages only could be recovered in satisfaction,
the action died with the person to whom, or by whom the
wrong was done. Thus where the action was founded on
any malfeasance or misfeasance, was a tort, arose *ex delicto*,
such as trespass for taking goods, &c., trover, false imprison-
ment, assault and battery, slander, &c., diverting a water-
course, obstructing lights, escape, and many other cases of
the like kind, where the declaration imputes a tort done
either to the person or the property of another, and the *plea*
under the old pleading must have been "not guilty," the rule
was *actio personalis moritur cum personâ*. But this rule
received considerable alteration by the statute 4 Edw. III.
c. 7, *de bonis asportatis in vitâ testatoris*, which reciting,

Ancient com-
mon law rule
*actio per-
sonalis moritur
cum personâ*.

Stat. 4 Edw.
III. c. 7.

(*h*) Com. Dig. Admon. (B. 13).
Where, however, personal con-
siderations are of the foundation
of the contract, as in cases of prin-
cipal and agent, and master and
servant, the death of either party
puts an end to the relation; and
in respect of service after the death,
the contract is dissolved unless
there be a stipulation express or

implied to the contrary: *Farrow
v. Wilson*, L. R. 4 C. P. 745, 746.

(*i*) *Pease v. Mead*, Hob. 9.
Went. Off. Ex. 215, 14th edit.

(*k*) Hob. 9, 10. 1 Roll. Abr.
915, Executors (X.) pl. 2. *Post*,
Ch. II.

(*l*) *Neal v. Hanbury*, Prec. Chan.
173. See also *Barford v. Stuckey*,
1 Bingham 225.

Stat. 25 Edw.
III. s. 5, c. 5.

The executor may now have an action for all injuries to the personal estate, whereby it has become less beneficial to him, whatever the form of action may be.

that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were living. And this remedy is further extended to executors of executors, by 25 Edw. III. stat. 5, c. 5, and to administrators by an equitable construction of the former statute (*m*). The Act 4 Edw. III. being a remedial law, has always been expounded largely: and though it makes use of the word *trespasses* only, has been extended to other cases within the meaning and intent of the statute (*n*). Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* of the deceased in his lifetime, *whereby it has become less beneficial to the executor or administrator*, as the deceased himself might have had, whatever the form of action may be (*o*). So that he now may have trespass or trover (*p*); an action against the sheriff for a false return in the lifetime of the testator (*q*); debt on a judgment against an executor sug-

(*m*) This is stated by Mr. Sergeant Williams in 1 Saund. 217, to be by the stat. 32 Edw. III. c. 11: But that statute only gives an action to the administrator to recover as executor the *debts* due to the intestate. See Mr. Fraser's note to Pinchon's case, 9 Co. 89, *a*.

(*n*) *Emerson v. Emerson*, 1 Ventr. 187. *Le Mason v. Dixon*, Sir W. Jones, 174. So Lord Ellenborough in *Wilson v. Knubley*, 7 East, 134, says, "It is a very ancient statute passed at a period when no great precision of language prevailed, and the body of the act does not

speak of *actions on trespass*, though the instance put is proper for such an action, but it speaks of actions *for a trespass* done to the testator's goods; and it enacts that executors in such cases shall have an *action against the trespassers*; apparently using the word *trespass* as meaning a wrong done generally, and the *trespassers* as wrongdoers." (*o*) 1 Saund. 217, n. (1). See *Lockier v. Paterson*, 1 Carr. & K. 271.

(*p*) *Russell's case*, 5 Co. 27, *a*. *Rutland v. Rutland*, Cro. Eliz. 377.

(*q*) *Williams v. Cary*, 4 Mod. 403: for this was not properly an

actions for a trespass and chattels of the kind so as such trespass, that the executors of the trespassers, and they, whose executors are. And this remedy is given, by 25 Edw. III. by an equitable construction. The Act 4 Edw. III. expounded largely: *trespasses* only, has meaning and intent of equitable construction. The executor shall now have to the personal estate by it has become less, as the deceased form of action may trespass or trover (*p*); an action in the lifetime of the testator an executor suggest-

actions on trespass, though the remedy put is proper for such, but it speaks of actions done to the testator's estate and it enacts that executors of such cases shall have an action against the trespassers; applying the word *trespass* as a wrong done generally, to trespassers as wrongdoers. Saund. 217, n. (1). See also Paterson, 1 Carr. & K.

Small's case, 5 Co. 27, n. Rutland, Cro. Eliz. 377. Williams v. Cary, 4 Mod. this was not properly an

gesting a *devastavit* (*r*); an action for removing goods taken in execution before the testator (the landlord) was paid a year's rent (*s*); an action to recover the price paid by the intestate for valueless shares on the faith of a fraudulent prospectus (*t*): an action to restrain the infringement of a registered trade-mark with the usual claim for an account of profits and damages (*u*): an action for falsely and maliciously publishing a statement calculated to injure the right of property of the testator in a trade-mark (*v*), and other actions of the like kind for injuries done to the personal estate of the deceased in his lifetime (*x*). But if the cause of action is in substance an injury to the person, the personal representative cannot maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury (*y*).

So an executor or administrator may have a *quare impedit* for a disturbance in the time of his testator or intestate, by the equity of the statute 4 Edw. III. c. 7 (*z*). So the personal representative of a termor may maintain ejectment, where the testator had a lease for years, or from year to year, whether the ouster was before or after his death (*a*). So he

injury done to the person of the testator, but it was an injury to his estate: 3 Bac. Abr. 98, Exors. (P. 2). See also Spurstow v. Prince, Cro. Car. 297.

(*r*) Berwick v. Andrews, 1 Salk. 314.

(*s*) Palgrave v. Wyndham, 1 Stra. 212.

(*t*) Twycross v. Grant, 4 C. P. D. 40.

(*u*) Oakey v. Dalton, 35 C. D. 700.

(*v*) Hatchard v. Mege, 18 Q. B. D. 771.

(*z*) 1 Saund. 217, n. (1).

(*y*) Pulling v. Great Eastern Ry. Co., 9 Q. B. D. 110, 112.

(*a*) Wentw. Off. Ex. 164, 14th

edit. Smallwood v. Bishop of Coventry, Cro. Eliz. 207. S. C. Savil. 94, 118. Owen, 99. 1 Lutw. 1. 1 And. 241. 1 Leon. 205. 4 Leon. 15. It appears from the report of the case in Lutwiche, Anderson, and Saville, that the testator had only a chattel interest in the advowson: But, *semble*, that the law is the same where he was seised in fee; for the ground of the decision is, that the void term was a chattel which would have gone to the executor if the disturbance had not been: Cro. Eliz. 207. See *ante*, pp. 592, 593, *et seq.*

(*a*) Slade's case, 4 Co. 95, *a*. Moreton's case, 1 Vent. 30. Doe v. Porter, 3 T. R. 13. He was

Actions for
torts to the
person or the
freehold do
not survive to
the executor.

might have had debt on the statute for not setting out tithes due to the testator (b).

But the statute of Edw. III. does not extend to injuries done to the person (c), or to the freehold of the testator. Therefore an executor or administrator shall not have actions of assault or battery, false imprisonment, libel (d), slander, deceit, nor (unless by virtue of the stat. 3 & 4 Wm. IV. c. 42, s. 2, hereafter to be mentioned) (e) for diverting a watercourse, obstructing lights, or other actions of the like kind : for such causes of action still die with the testator (f).

Since actions founded on wrongs to the freehold do not survive, it is clear that the executor cannot (unless by virtue of the statute just cited) maintain trespass *quare clausum fregit* (g), nor an action merely for cutting down trees (h), or other waste in the lifetime of the testator on his freehold (i). So if a man cut the growing corn of the testator and let it lie, no action can be maintained by the executor (k); but if the corn be cut and carried away, (although he cannot have an action of trespass *quare clausum fregit* and *blada asportavit* (l) he may have trespass *de bonis asportavit* on the statute of Edward III. : And even where the executor declared that the defendant *blada crescentia* upon the freehold of the testator *messuit defalcavit et*

held entitled to an *ejectione firmæ*: Bro. Abr. Executors, 45. Russell v. Prat, cited 1 And. 243. Peytoe's case, 9 Co. 78 b.

(b) Holl v. Bradford, 1 Sid. 88. Morton v. Hopkins, 1 Sid. 407. Moreton's case, 1 Vent. 30. But he could not enforce payment of tithes such as his testator never claimed : Cart v. Hodgkin, 3 Swanst. 160.

(c) See Denman, J., in Pulling v. G. E. Ry. Co., 9 Q. B. D. 110 113.

(d) Hatchard v. Mege, 18 Q. B. D. 771.

(e) Post, p. 702.

(f) 1 Saund. 217, a., n. (1).

(g) Bro. Executor, pl. 120.

(h) Williams v. Breedon, 1 Bos. & Pull. 329.

(i) Godolph. Pt. 2, c. 22, s. 2. The executor of the lessor clearly could not have an action of waste (now abolished), for waste committed in the lifetime of the testator; for he had no right to recover the place wasted, the inheritance of which has descended to the heir : Wentw. Off. Ex. 163, 14th edition.

(k) Emerson v. Emerson, 1 Vent 187.

(l) Ibid.

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son v. Emerson, 1 Vent

asportavit, it was held, in *Emerson v. Emerson* (*m*), that the action well lay, and that the allegation of *messuit* and *defalcavit* only described the manner of taking the corn away. It was said in that case, that if the *grass* of the testator be cut and carried away at the same time, no action will lie for the executor, because the grass is part of the freehold ; but corn growing is a chattel (*n*) : and the like distinction is taken in Wentworth's Office of an Executor (*o*) between a trespass in destroying or taking away corn growing, and a trespass in grass or wood growing ; because though the testator should have died before severance, the corn would have gone to the executor (*p*), whereas the wood and grass would have gone to the heir. However, it should appear from the case of *Williams v. Breedon* (*q*), that an action may be maintained by an executor against the man who has cut down and carried away the trees of the testator, for taking and carrying away "the goods and chattels, to wit, the wood, timber, and boughs of the deceased in his lifetime." So where grass is mowed by a trespasser, and carried away as hay, an action of trover and conversion for so many loads of hay is doubtless maintainable by the executor (*r*).

(*m*) 1 Vent. 187.

(*n*) See *ante*, p. 623, *et seq.*

(*o*) P. 166, 14th edit.

(*p*) See *ante*, p. 623, *et seq.*

(*q*) 1 Bos. & Pull. 330.

(*r*) Went. Off. Ex. 167, 14th edit. The author of that work expresses his opinion that the executor ought to be able to maintain an action on the statute Edw. III. in the case of meadow-grass consumed by the mouths of the cattle of a trespasser, in the following curious language, pp. 167, 168 : "When meadow-ground, which yearly conceiveth (*Sol sine homine generat herbam*), shall be ready to be delivered of her burthen, if a

stranger put in a herd of cattle which swallow up and tread down this fruit of her womb before the mower with his scythe come as a midwife to help her delivery, if then, by the hasty death of the owner, before action brought, this great trespass should be dispunishable, it were contrary, as methinks, to the purpose of the said statute, and a great defect in the law." The same author proceeds to distinguish the case of the testator dying before the time for mowing, and his surviving till the hay-time was clearly past : in the latter case, it is said, the executor certainly ought to have his action, because

Actions for
torts to
chattels real.

A distinction is suggested by the author of the Office of an Executor, with reference to the estate of the owner of land: for assuming that where the land is his freehold or copyhold inheritance, no action should be given to his executor for wood or grass destroyed in his lifetime; yet where he is but tenant for years, or tenant by extent, so that the very estate in the land was to come and is to come to the executor (together with *quicquid plantatur solo*), the executor or administrator, in the opinion of the author, ought to have, together with the estate in the soil, the action to punish the trespasser upon the soil (s).

In *Adam v. The Inhabitants of Bristol* (t), a point was raised with respect to this subject, which it ultimately became unnecessary for the Court to decide: viz., whether the executor of a lessee for years could in any case maintain an action against the Hundred, upon the stat. 7 & 8 Geo. IV. c. 31, s. 2, for an injury by rioters to the premises under lease sustained in the lifetime of the testator (u).

3 & 4 Will. IV.
c. 42, s. 2,
Executors, &c.,
may within a
year after the

By stat. 3 & 4 Wm. IV. c. 42, s. 2, after reciting that no remedy is provided by law for injuries to the real estate of any person deceased, committed in his lifetime, for remedy

if the trespass had not been committed, the grass would have been a chattel severed, and the personal estate would have been increased.

(s) Wentw. Off. Ex. 169, 14th edition.

(t) 2 Adol. & Ell. 389.

(u) It was urged by the counsel for the plaintiff in this case, that the authorities shew that an executor may sue for a trespass to a chattel real of his testator, inasmuch as it has been held that an executor may maintain ejectment, or *ejectione firmæ*, on the ouster of his testator (see *ante*, p. 699, and note (a), which are, in fact, actions of trespass): And Peytoe's

case, 9 Co. 78, b, was cited. There the Court referred to 7 H. IV., 6b, as having decided that by force of the stat. 4 Edw. III. c. 7, which gives an action of trespass *de bonis asportatis in vita testatoris*, the executors shall have *ejectione firmæ in vita testatoris*, because that is an action of trespass. On reference to the Year Book itself, it appears that, in fact, the argument for the executor was that the statute enacts that executors shall have action for the goods taken from the possession of their testators, and the term is nothing but a chattel: And by Hankford: If tenant by elegit be disseised and dies, his executor shall have an action for that.

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thereof it is enacted, that an "action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the *real estate* (x) of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person (y), and provide that such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person."

A further most important alteration in this part of the law has been effected by the stat. 9 & 10 Vict. c. 93 (entitled *An Act for compensating the Families of Persons killed by Accidents*), which, after reciting that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injuries so caused by him:" enacts, "whenever the death of a person (z) shall be caused by wrongful act, neglect, or

death of the
testator, &c.,
bring actions
for injuries to
real estate,
committed
within six
months before
the death.

9 & 10 Vict.
c. 93.
[Lord Camp-
bell's Act]:

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(z) *Quere*, whether these words apply to injuries to chattel interests in land, or whether a remedy is given by the stat. 4 Edw. III. c. 7: See *supra*, p. 702, and note (u).

(y) In an action where a sole plaintiff in an action for a mandatory injunction and damages for obstruction to the access of light to a freehold house, had died more than six months after the issue of the writ the executor and devisee obtained the common order to carry on proceedings. On motion to discharge this order for irregularity on the ground that the cause of action did not continue, and that there was no transmission of interest to the executor,

it was held that though any action by the executor for injury to the plaintiff's *real estate* might under this section be limited to the six months prior to the plaintiff's death, still he could recover damages to this extent. As to the claim for mandatory injunction, it was held that this devolved on the executor in his right as devisee, and that consequently he could maintain such claim: *Jones v. Simes*, 43 C. D. 607.

(z) *The Explorer*, L. R. 3 Adm. 289: where it was held that the provision of the above Act extended to a case where the person, in respect of whose death damages were sought to be recovered, was

person causing death through neglect, &c., notwithstanding the death of the person injured :

default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

action to be for the benefit of certain relations, and shall be brought by and in the name of

By sect. 2, "Every such action shall be for the benefit of the wife, husband, parent, and child (a) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages (b)

an alien, and was at the time of the wrongful act, neglect, or default which caused his death, on board a foreign vessel on the high seas.

(a) This does not extend to a bastard child: *Dickinson v. North-Eastern Railway*, 2 Hurlst. & C. 735.

(b) The jury, in estimating the damages, cannot take into consideration mental suffering or loss of society, nor expenses incurred by the funeral or mourning: *Dalton v. South-Eastern Railway Company*, 4 C. B., N. S., 296: but must give compensation for pecuniary loss only: *Blake v. Midland Railway Company*, 18 Q. B. 93. But legal liability alone is not the test of injury, in respect of which damages may be recovered: The reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned:

Franklin v. South-Eastern Railway, 3 H. & N. 211. *Dalton v. South-Eastern Railway*, 4 C. B., N. S. 296. *Duckworth v. Johnson*, 4 H. & N. 653. *Pym v. Great Northern Railway*, 2 Best & Sm. 759. S. C. (in error) 4 Best & Sm. 396. *Sykes v. North-Eastern Railway Company*, 44 L. J. C. P. 191. *Hetherington v. North-Eastern Railway Company*, 9 Q. B. D. 160. It should be observed that the statute gives to the personal representative a cause of action beyond that which the deceased would have, if he survived, and based on a different principle: for the condition, that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of: *Pym v. Great Northern Railway Company*, 2 Best & Sm. 757. 4 Best & Sm. 406. It must be further observed, that the remedy

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v. South-Eastern Rail- & N. 211. Dalton v. tern Railway, 4 C. B. Duckworth v. Johnson, N. 653. Pym v. Great Railway, 2 Best & Sm. C. (in error) 4 Best & Sykes v. North-Eastern Company, 44 L. J. C. P. herington v. North-East- ay Company, 9 Q. B. D. should be observed that e gives to the personal tive a cause of action at which the deceased ve, if he survived, and a different principle: ondition, that the action been maintained by the f death had not ensued, nce not to the nature s or injury sustained, e circumstances under e bodily injury arose, nature of the wrongful t, or default complained v. Great Northern Rail- any, 2 Best & Sm. 767. Sm. 406. It must be served, that the remedy

as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct (c).

Sect. 3. "Not more than one action shall lie for and in respect of the same subject-matter of complaint: and every such action shall be commenced within twelve calendar months after the death of such deceased person.

Sect. 4. "In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such

executor or administrator of the deceased :

only one action shall lie, and to be commenced within twelve months :

plaintiff to deliver a full particular of the person for whom such damages are claimed :

given by the statute is to individuals, and not to a class; and therefore, on the death of a person whose income arose from land and personality, independent of any exertion of his own, no portion of which was lost to his family by his death, the action is maintainable, if, in consequence of that death, the mode of distribution among the members is changed : 4 Best & Sm. 396. If, however there is no evidence of actual pecuniary damage (in the sense above explained), the action will fail : Duckworth v. Johnson, 4 H. & N. 652. If the personal representative of a deceased person brings an action under this Act, it is a good defence that the defendants paid to such deceased person in his lifetime, and he accepted a sum of money in full satisfaction and discharge of all claims and causes of action he had against the defendants : the cause of action being defendant's negligence, which has

been satisfied in the lifetime of the injured person, and his death does not create a fresh cause of action : Read v. Great Eastern Railway, L. R. 3 Q. B. 555.

(c) In a case where a sum of money was received from a railway company by way of compensation by the executors of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under Lord Campbell's Act, the executors brought an action in the Chancery Division, to which all the relatives referred to in section 2 of the Act were parties, asking for a declaration as to the persons entitled to the money. The Court held that it could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the Act : Bulmer v. Bulmer, 25 C. D. 409.

construction
of Act.

27 & 28 Vict.
c. 95. Where
no action
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the executor
within six
months, it
may be
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the persons
beneficially
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the result.

action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered (*d*).

Sect. 5. "The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter: that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word 'person' shall apply to bodies politic and corporate; and the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter."

By stat. 27 & 28 Vict. c. 95, s. 1, it is enacted, that if it shall happen that no action such as is mentioned in statute 9 & 10 Vict. shall be brought by the executor or administrator of the deceased within six months after the death, such action may be brought by and in the name of the persons for whose benefit such action would have been, if it had been brought in the name of the executor or administrator (*e*).

The question has been raised as to whether, in a case where a person has brought an action as administratrix of the deceased under Lord Campbell's Act, and has obtained judgment and been paid damages as such administratrix in full satisfaction, and discharge, of the judgment and causes of action, the same administratrix is entitled to bring another action as administratrix, outside the provisions of such Act, in respect of the assets and estate of the deceased, and whether an admission on the record made in the action under the Act can be set up in the other action, so that the defendants, who have submitted in the action under the Act, are to be precluded from denying the facts alleged in the other action. It was

(*d*) See *Chapman v. Rothwell*, 1 E. B. & E. 168, as to the form of the declaration.

(*e*) By sect. 2, money may be paid into Court in one sum.

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name of the persons
e been, if it had been
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o whether, in a case
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dgment and causes of
tled to bring another
visions of such Act, in
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action under the Act
t the defendants, who
ct, are to be precluded
other action. It was

sect. 2, money may be
Court in one sum.

decided in *Leggott v. Great Northern Rail. Co. (f)*, that in-
asmuch as the entire object and effect of the two actions are
totally different and they are brought in different rights
(although the machinery nominally is the same), the adminis-
tratrix, in the action under the Act suing, not in respect of
anything which belonged to the deceased, but by force of the
statute which enacts that the deceased's death is to be made the
subject of an action, just as if he had lived, the second action
is not barred by the judgment and satisfaction in the action
under the Act, and that there is no estoppel of which either
party can take advantage.

Akin to the right of action by an executor or administrator
under this Act, is that of the legal personal representative of a
deceased workman against his employer under stat. 43 & 44
Vict. c. 42 (Employers' Liability Act, 1880), which enacts

Employers'
Liability Act,
1880.
Stat. 43 & 44
Vict. c. 42.

"where after the commencement of this Act personal injury
is caused to a workman" in any of the various ways men-
tioned in section 1, "the workman, or, in case the injury
results in death, the legal personal representatives of the
workman, and any persons entitled in case of death, shall
have the same right of compensation and remedies against
the employer as if the workman had not been a workman of,
nor in the service of, the employer, nor engaged in his work.

Sect. 1.

Section 2, enumerates cases in which the workman shall not
be entitled to any right of compensation or remedy under the
Act.

Sect. 2.

Section 3, limits the amount of compensation recoverable
under the Act.

Sect. 3.

By section 4, an action under the Act shall not be main-
tainable unless notice that the injury has been sustained is
given within six weeks, and the action is commenced within
six months from the occurrence of the accident causing the
injury, or, in case of death, within twelve months from the time
of death: provided always, that, in case of death, the want of
such notice shall be no bar to the maintenance of such action

Sect. 4.

if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Sect. 5.

By section 5, money payable under any penalty is to be deducted from compensation awarded.

Sect. 6.

Section 6, assigns the trial of actions under the Act to the County Court (subject to removal into the Superior Court).

Sect. 7.

Section 7, deals with the contents of the notice of injury required by the Act, and the mode of service.

Actions *ex*
quasi con-
tractu.

It must be observed, that if the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action, at common law, to recover such damage, although the action is in some sort founded on a tort. Thus in *Knights v. Quarles* (g), where an administrator declared in *assumpsit* against an attorney for negligence in investigating a title about to be conveyed to the intestate, and the declaration went on to allege special damage to the personal estate; the defendant demurred; and it was urged on his behalf, that the action, though in form *ex contractu*, was in substance *ex delicto*, the breach of promise complained of being no more than a *tort* arising out of a neglect of duty: But the Court were of opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer: that it made no difference in this case whether the promise was express or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action should be maintained, or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury: It was further observed, that if a man contracted

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if a man contracted

for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured—though it was clear, he, in his lifetime, might, at his election, sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract (*h*).

The above rule of the common law that *actio personalis moritur cum personâ* seems never to have been applied by the old authorities to causes of action on contracts: On the contrary, those authorities are uniform, that this maxim is always to be understood of a tort, and that the personal representative may sue, by the common law, not only for all debts due to the deceased by specialty or otherwise, but for all covenants and indeed all contracts with the testator *broken in his lifetime* (*i*). And the reason appears to be that these are *Choses in Action*, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the deceased, and is in law his assignee (*j*). But these authorities have been limited by modern decisions hereafter to be mentioned, and must, at this day, be understood with some qualification.

A qualification has, in the first place, been introduced by the case of *Chamberlain v. Williamson* (*k*), which seems to have established that no action is maintainable by the executor or administrator upon an express or implied promise to

Whether the rule *actio personalis moritur cum personâ* can ever be applied to actions on contracts:

where the breach of contract was an injury to the person:

(*h*) See *Accord. Alton v. Midland Railway Company*, 19 C. B., N. S. 242, per Willes, J., and *Bradshaw v. Lancashire and Yorkshire Railway Company*, L. R. 10 C. P. 189: but as to the latter case, see the observations made by Mellor and Quain, JJ., in *Leggott v. Great Northern Railway Company*, 1 Q. B. D. 599.

(*i*) See Com. Dig. Administration (B. 13). Covenant (B. 1).

Bac. Abr. Exors. (N.).

(*j*) *Raymond v. Fitch*, 2 Crompt. Mees. & Rosc. 588, 597. *Ante*, p. 696.

(*k*) 2 Maule & Selw. 408. For the converse of this case, see *Finlay v. Chirney*, 20 Q. B. D. 494, where it was held that an action for breach of promise of marriage where no special damage is alleged, does not survive against the personal representatives of the promisor.

the deceased, where the damage consisted entirely in the personal suffering of the deceased, without any injury to his personal estate. "Executors and administrators," said Lord Ellenborough in that case, "are the representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held, that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased, where no special damage to the personal estate can be stated on the record (*l*). So with respect to injuries affecting the life and health of the deceased: all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; generally speaking, no action can be sustained by the executor or administrator on a breach of the implied promise by the person employed to exhibit a proper portion of skill and attention: such cases being, in substance, actions for injuries to the person (*m*).

actions upon
covenants
real :

A further qualification of the old authorities has taken place in respect to contracts relating to the freehold.

It has been settled, from the earliest times, that the right to sue upon covenants real will in many cases descend to the heirs of the covenantee, or go to his assignee, to the exclusion of the executor. Thus, if a feoffment be made in

(*l*) Mr. Serjeant Peake, who argued in *Chamberlain v. Williamson*, in support of the executor's right, stated that a case of the sort had been lately before the K. B. in Ireland, in which the action had been held maintainable. But that learned person did the writer the favour of informing him, that although he (Serjeant Peake) was so instructed by his client, he afterwards received a letter from Mr. Gould, of the Irish Bar, informing him that no

such case had occurred in the Court of K. B. there, but that in the year 1813, a case of—*Administrator of Tewtry v. O'Regan* (in which he was counsel), had come before the Court of Exchequer, and that Court held, that the action was *not* maintainable.

(*m*) *Chamberlain v. Williamson*, 2 M. & S. 415, 416. See *ant*, pp. 708, 709, as to the cases where actions of this kind are maintainable.

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Chamberlain v. Williams,
S. 415, 416. See ante,
709, as to the cases where
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fee, and the feoffor covenants to warrant the lands or other-
wise, to the feoffee and his heirs, in this case the heir of the
feoffee shall take advantage of the covenant (*n*). So the
interest in a covenant to levy a fine has been taken to be an
inheritance descending to the heir of the covenantee (*o*). And
the heir may have an action on a covenant real, although
nothing has descended on him from the ancestor, with which
the covenant can run: As if A. covenant with B. and his heirs
to infeoff B. and his heirs, and B. dies before it be done, in
this case his heirs shall take advantage of it (*p*). So where
three coparceners purchased land in fee and mutually cove-
nanted for them and their heirs, with them and every of them
and their heirs, that the survivors should convey to the heirs
of such as should die first, it was resolved that this was a real
covenant, and went to the heir of the covenantee (*q*). And a
covenant which runs with the land will go to the heir, not
only without naming him, but where it is made with the
covenantee and his executors (*r*).

But if such a covenant had been broken in the lifetime of
the testator, or intestate, it should seem, according to the old

(*n*) Touchst. 175.

(*o*) Winter v. D'Evreux, 3 P.
Wms. 189, note (B).

(*p*) Fitz. N. B. 145, C. Touchst.
175.

(*q*) Wooton v. Cooke, Jenk. 241.

(*r*) Lougher v. Williams, 2 Lev.

92. So where the heir assigned a
breach in covenant, that the pre-
mises were out of repair *tali die et*
per decem annos, which included
part of his ancestor's time; after
verdict for the plaintiff, it was
moved in arrest of judgment that
part of the ten years occurred in
the life of the ancestor; but it
was laid down by Holt, C.J., that
if the premises were out of repair
in the time of the ancestor, and
continued so in the time of the

heir, it was a damage to the heir,
and the jury must give as much in
damages as will put the premises
into repair; but that thereby no
damages are given in respect of
the time the premises continued in
decay, but in respect of what it
will cost at the time of action
brought to put the premises in
repair: wherefore *per decem annos*
was frivolous: Vivian v. Campion,
1 Salk. 141. According to a
report of this case in 11 Mod. 45
(a book, it must be allowed, of
indifferent authority), Lord Holt
added, that the heir ought not to
allege a breach in the ancestor's
time, because that belongs to the
executor.

where a formal breach only has taken place in the testator's lifetime, but the substantial damage has arisen since his death :

authorities before mentioned, that the rule was, that the executor or administrator might sue upon it. Thus it is laid down in Comyn's Digest (s), that if a man covenants with B., his heirs and assigns upon a grant or conveyance of an inheritance, the executor or administrator may have covenant for damages upon a breach in his lifetime (t).

This rule, however, has been directly qualified by the decision of the case of *Kingdon v. Nottle* (u), followed by that of *King v. Jones* (v), in which cases it was held that where there are covenants real, that is which run with the land, and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff.

In *Kingdon v. Nottle*, a grantor of an estate in fee had covenanted with the grantee, that he was seised in fee and had a right to convey, &c.: And it was held that the executor of the grantee could not maintain an action, assigning for breach that the grantor was not seised in fee and had not a right to convey (w). In *King v. Jones*, a vendor had covenanted with the vendee and his heirs for further assurance on request, and a request was made by the vendee in his lifetime to have a fine levied, but no such fine was levied, and the vendee was not evicted during his lifetime, but his heir was afterwards evicted: And it was held, that as the ultimate

(s) Tit. Covenant (B. 1).

(t) See also Went. Off. Ex. 160, 14th edition, where it is said, "Perhaps some will doubt of covenant touching inheritance, viz., the assurance of lands, or enjoyment thereof free from this or that incumbrance, or the like; yet even in those cases, if the covenant were broken in the testator's lifetime, I think clearly the action is accrued to the executor, for that his testator was to recover damages

in the action of covenant for that breach; and he being entitled to these damages as principal, and not any accessory thing in that action, the law hath cast that action upon the executor."

(u) 1 M. & S. 355.

(v) 5 Taunt. 418: affirmed in error in 4 M. & S. 188.

(w) In another action of the same name, in 4 M. & S. 53, it was held that the action was properly brought by a devisee.

damage had not been sustained in the time of the ancestor, the action remained to the heir in preference to the executor, although the breach accrued in the ancestor's lifetime by the request and refusal (x).

But it was admitted by the Judges, in these cases, that when the *ultimate damage* is sustained in the lifetime of the ancestor, as where he is evicted, and the land, and consequently the covenant, does not descend to the heir, there the executor can only sue upon the covenant (y). And the Court, with this distinction, recognized the decision of *Lucy v. Lexington* (z), where it was held that the executor might recover for a breach, in his testator's life, of a covenant for quiet enjoyment.

In the before mentioned case of *Knights v. Quarles* (a), an action of *assumpsit* was brought by an administrator, against an attorney, for negligence in investigating a title about to be conveyed to the intestate, by means of which the premises were conveyed to him with a bad title; and the declaration went on to aver, that the testator was thereby unable to sell the property, and alleged special damage to the personal estate: It was objected, on demurrer to the declaration that this was a contract regarding land on which an administrator could not sue: But the Court of Common Pleas unanimously held the action well brought.

In *Orme v. Broughton* (b) the declaration, in an action of *assumpsit* by an administrator, alleged that in consideration that the deceased had agreed to buy certain land of the

(x) It was held by Mr. Justice Bayley, in the case of *Kingdon v. Nottle*, 1 M. & S. 362, that if the executor could allege in his declaration that the testator was prevented from selling the estate by the assigned breach of the covenant, perhaps he might maintain the action.

(y) 1 M. & S. 365, 366. 5 Taunt. 427. The reason assigned in this case for excluding the heir, viz.,

that the ancestor having been evicted in his lifetime, nothing descended to the heir, does not appear quite satisfactory, inasmuch as an heir may sue on a covenant real, though he takes nothing by descent: See *ante*, p. 711.

(z) 2 Lev. 26.

(a) 2 Brod. & B. 102. *Ante*, p. 708.

(b) 10 Bingham. 533.

actions on contracts not under seal relating to land:

defendant at a certain price, and had paid him part thereof, as deposit money, the defendant promised the deceased to furnish an abstract of a good title to the land, in sufficient time for the completion of the purchase by a day specified, and that he was requested by the deceased to furnish it, and failed; by means whereof the deceased lost the benefit of the purchase, and was put to expense in endeavouring to procure the said title, and was deprived of the use of the money deposited: To this declaration the defendant demurred: and it was urged, in support of the demurrer, that the contract was still open and existing, and that, though the intestate had recovered damages, he might still have brought a second action, or have proceeded in equity to enforce the performance: and that the damage, if any, was to the heir, and not to the administrator: But the Court of Common Pleas held that the plaintiff was entitled to judgment; for that there appeared on the face of the record a personal contract, a breach of it in the lifetime of the intestate, and a loss to his personal property: That after bringing an action in which the grievance alleged was a loss sustained by breach of the contract, it would be impossible to bring a second action, or to resort to any other means to enforce the contract: And that it was clear the heir could not sue the defendant; for in all the cases where the heir had sued, the action had been on a covenant: but he could have no right of action on a mere agreement to sell.

whether an executor may sue on a contract broken in the testator's life, where no damage to the personal estate can be stated:

The language of the Judges in the before-mentioned case of *Chamberlain v. Williamson* (c), seems to justify an inference, that the right of an executor or administrator to sue on a breach of contract made with the deceased is confined to cases in which such breach can be stated as a damage to the personal estate: And although in the earlier case of *Kingdon v. Nottle* (d), where the plaintiff sued as executor, it seems to have been in some degree conceded by the Court that if *any* damage had accrued to the testator in his lifetime, by breach

(c) *Ante*, p. 709.

(d) 1 M. & S. 355.

of the covenant real, the executor might have maintained the action: yet Lord Ellenborough, when the case of *Kingdon v. Nottle* was again brought before the Court (e) (the devisee being then the plaintiff), appears to regard the intervening case of *Chamberlain v. Williamson*, as having established that the right to sue is so confined.

In a former edition of this Work, the writer ventured to suggest a doubt, whether the law thus considered was not at variance with two former decisions, viz., the case of *Morley v. Polhill* (f), and that of *Smith v. Simonds* (g), which did not appear to have been noticed by the counsel or Court, in any of the modern cases on the subject of the right of an executor to sue on breaches of covenants, running with the land, incurred in the lifetime of the testator. In the former of these two cases, it was held that the executor of a deceased bishop might bring an action against a lessee on a breach, in the lifetime of the testator, of a covenant to repair in a former bishop's lease: In the latter, an administrator *de bonis non* brought covenant, and assigned for breach, in the lifetime of his testator, that the land was not discharged of incumbrances; and it was held on error that the action well lay.

This doubt has been justified by the subsequent decision of the Court of Exchequer in *Raymond v. Fitch* (h). In that case, the question was, whether an executor could sue the lessee of his testator on a breach of a covenant not to fell, stub up, head, lop or top timber trees, excepted out of the demise, such breach having been committed in the lifetime of the testator; and no part of the timber, loppings or toppings appearing to have been removed by the defendant: And it was held in the affirmative: and Lord Abinger, in delivering the judgment of the Barons, observed, that it had been urged on the part of the defendant that the limitation of the old authorities, effected by the case of *Chamberlain v. Williamson*, must be applied to all contracts except such

(e) 4 M. & S. 53.

(g) Comberb. 64.

(f) 2 Ventr. 56.

(h) 2 Crompt. M. & R. 588.

as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not: and that upon such contracts the executor could not sue without alleging a special damage to the personal estate: But that the case certainly did not go that length; and that he and the other Barons (Parke, Bolland, and Gurney) thought that such an extension of the doctrine laid down in it was not warranted by law, and that it could not be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal; that the present case was one of that description; that it was a case more favourable to the executors than those of *Morley v. Polhill* (i), *Smith v. Simonds* (j), and *Lucy v. Levington* (k), in which the covenant ran with the land; and that if the last case was to be considered as having been decided, as was suggested in the argument, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal estate (though such a ground was not intimated in either report), it was difficult to say that the loss of the shade and casual profits of trees was not equally so.

It should be observed, that in the case of *Raymond v. Fitch*, above stated, the covenant in question was purely collateral, and did not run with the land; for the trees, which it was covenanted not to fell, &c., were excepted from the demise; and therefore the heir or devisee of the land, on which the trees grew, could not sue for a breach of the covenant, whether incurred before or after the death of the covenantor: Unless, therefore, the executor had the power to sue, all remedy was lost.

The authority of this decision was fully confirmed and acted on in the subsequent case of *Ricketts v. Weaver* (l),

(i) *Ante*, p. 715.

(k) *Ante*, p. 713.

(j) *Ante*, p. 715.

(l) 12 M. & W. 718.

and the performance of it, and the breach of it, and the testator, whether such as that upon such contract alleging a special case at the case certainly and the other Barons that such an extension is not warranted by a contract broken to the benefit of which, if it be an action as part of the contract under that description; the executors than *v. Simonds (j)*, and the tenant ran with the consideration as having an argument, on the basis of an eviction of the estate (though such a case), it was difficult to say that the profits of trees was

case of *Raymond v. Simonds* was purely col-
for the trees, which
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power to sue, all

fully confirmed and
Chetts v. Weaver (l),

p. 713.
& W. 718.

in which it was held that an executor of a tenant for life may sue for a breach, incurred in the testator's lifetime, by his lessee, of a covenant to repair, without averring any damage to his personal estate.—And the result of the case of *Raymond v. Fitch* was stated by Parke, B., to be, that unless it be a covenant in which the heir alone can sue (according to *Kingdon v. Nott (m)*, and *King v. Jones (n)*) for a breach of the covenant in the lifetime of the testator, the executor can sue, except it is a mere personal contract, in which the rule applies that *actio personalis moritur cum persona*.

An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party: Thus, where A. promised to B. that if B. would pay 50*l.* to C., his son, who was married to D., the daughter of A., that then he would pay 100*l.* to D., his daughter, at such a time; B. paid the 50*l.* to C., and A. failed of the payment of the 100*l.*: B. died intestate; E., his executor, brought an action upon the case upon *assumpsit*, upon the promise made to B., the intestate; and it was adjudged that the action did well lie by the administrator, although he should have no benefit by it if he did recover (o).

Wherever the reversion is for years, the executor or administrator is of course the only party capable of suing on a covenant made with the lessor, whether it run with the land or be in gross (p). An executor of tenant for years is expressly within the statute of 32 Hen. VIII. c. 34, and may maintain covenant against the assignee of the reversion.

actions on
covenants by
executor of
reversioner
for years.

(m) *Ante*, p. 712.

(n) *Ante*, p. 712.

(o) *Bafield v. Collard*, Sty. 6.

(p) *Roscoe on Actions*, 442.
See *Mackay v. Mackreth*, 2 Chitt.
Rep. 461.

SECTION II.

Particular instances where the Executor or Administrator is entitled to Choses in Action which the Deceased might have put in Suit, and where not.

The cases hitherto collected on this subject have been pointed out merely to develop the general principle as to the right of executors and administrators to the *choses in action*, on which the deceased himself might have sued. It remains to advert to some particular instances respecting this portion of an executor's or administrator's estate, as well in which his title has been denied as where it has been established.

Annuities :

First, as to annuities. An annuity is a yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only (*q*). As it concerns no land, it is so far considered personal property, that although granted to a man and his heirs or the heirs of his body, it is not an hereditament within the Statute of Mortmain, 7 Edw. I. stat. 2 (*r*), nor entailable within the statute *de donis* (*s*); and Lord Coke calls an annuity granted to a man and his heirs a fee simple *personal* (*t*). But in one respect, most important to the present subject, an annuity partakes of the nature of real property: *viz.*, that when granted *with words of inheritance*, it is descendible, and goes to the heir, to the exclusion of the executor (*u*). Unless, however, words of inheritance are employed in the grant, it has been held that the annuity will pass to the executors: As where a testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of 50*l.* to A. B. *for ever*; and it was held, that for the want of the

(*q*) Co. Litt. 144, *b*.

(*t*) Co. Litt. 2, *a*.

(*r*) Co. Litt. 2, *a*. note (1), by Hargrave.

(*u*) *Turner v. Turner*, Amb. 782, 783. *Stafford v. Buckley*, 2

(*s*) Co. Litt. 20, *a*. and note (4), by Hargrave.

Ves. Sen. 179.

ord heirs in the gift, the annuity passed, on A. B.'s death, to his personal representative (v).

There have been some modern decisions on the question whether annuities are to be considered real or personal estate. In *Lord Stafford v. Buckley* (x), Lord Hardwicke decided, that an annuity in fee of 1,000l., granted by King Charles the Second out of the Barbadoes duties, was not a realty within the statute *de donis*, or Statute of Frauds: and his lordship said, it was a personal inheritance, which the law suffers to descend to the heir (y). In *Lady Holder-ness v. Lord Carmarthen* (z), Lord Thurlow held that an annuity of 4,000l. charged upon the Post Office, until a sum of 100,000l. should be paid, in order to be laid out in land, was a mere personal annuity. In *Aubin v. Daly* (a), it was held by the Court of Queen's Bench, with respect to the same annuity which was the subject of Lord Hardwicke's decision in *Lord Stafford v. Buckley*, that the legal estate and interest in it passed by a will, not executed according to the Statute of Frauds, in which there was a residuary clause bequeathing all the rest, residue and remainder of the personal estate, of what kind and nature whatsoever, to the executors (b).

These cases of personal annuities in fee seem to form an exception to two general rules: the one, that, before the Wills Act (1 Vict. c. 26) came into operation, what would

(v) *Parsons v. Parsons*, L. R. 14 Eq. 260.

(x) 2 Ves. Sen. 170.

(y) 2 Ves. Sen. 178.

(z) 1 Bro. C. C. 377.

(a) 4 Barn. & Ald. 59.

(b) But where the testator devised his freehold estates to A. and B. and their heirs in trust, to permit his wife to hold and enjoy the same, and to receive the rents thereof for her life; and after her decease, in trust to permit his nephew, his heirs and assigns, to

hold and enjoy the estates, and to receive the rents thereof for ever, but subject to the payment of 20l. yearly for ever, to his niece, her executors, administrators, and assigns; with the payment of which sum the testator made chargeable his said estates, in manner and form aforesaid, immediately after the decease of his wife; *Shadwell, V.-C.*, held, that the niece took a legal rent-charge of 20l. per annum in fee: *Ramsay v. Thorngate*, 16 Sim. 575.

devolve upon the heir, could not be devised from him, but by a Will attested according to the Statute of Frauds: and the other, that though personalty be specifically bequeathed, it will in the first instance vest in the executor, and form part of his estate.

Canal shares,
&c.

In the cases of annuities above mentioned, the foundation of the decision that they were personal property, was, that they were in no way connected with land. But where an inheritance is granted, which arises out of land, it is considered real property, and *à fortiori*, will not go to the executor. In *Buckeridge v. Ingram* (c), shares in the navigation of the river Avon, under the statute 10 Anne, were held real estate (d). So in *Howse v. Chapman* (e), a share in the Bath Navigation was held to be real property, which descended to the heir: and the same was holden as to a New River share (f). But in *Bligh v. Brent* (g) the Court of Exchequer held that shares in the Chelsea Water Works were to be considered as personal property. And it has been usual of late years when Acts of Parliament are obtained for the making of Navigable Canals, and similar works, to procure a clause to be inserted, directing that the shares shall be deemed to be personal estate (h).

Shares under
Companies
Acts.

So by the Companies Act, 1862, it is enacted that "the shares or other interest of any member in a company under this Act shall be *personal estate* capable of being transferred in manner provided by the regulations of the Company" (i).

Stock in the
public funds:

It is here necessary to notice the rights of executors and administrators with respect to property in the public funds.

(c) 2 Ves. 653.

(d) *Portmore v. Bunn*, 1 B. & C. 699, 702.

(e) 4 Ves. 543.

(f) *Drybutter v. Bartholomew*, 2 P. Wms. 127. *Davall v. New River Comp.*, 3 De G. & Sm. 394. A lease of a lighthouse, and the tolls thereof, by the Corporation of Trinity House, has been held to be

a chattel real: *Ex parte Ellison*, 2 Y. & Coll. Exch. 528.

(g) 2 Y. & Coll. Exch. 268. See *Hayler v. Tucker*, 4 Kay & J. 248, *per Wood*, V.-C.

(h) See *Thompson v. Thompson*, 1 Coll. 381. *Robinson v. Addison*, 2 Beav. 515.

(i) 25 & 26 Vict. c. 89, sect. 22.

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See *Thompson v. Thompson*,
381. *Robinson v. Addison*,
515.

5 & 26 Vict. c. 89, sect. 22.

[Ch. I. § II.] *Choses in Action—Stocks in the Funds.*

The statute 1 Geo. I. sect. 2, c. 19, after creating a capital or joint-stock, on which annuities at the rate of 5 per cent. were to be attending, declares (sect. 9), "that all persons who shall be entitled to any of the said annuities, and all persons lawfully claiming under them, shall be possessed thereof, as of personal estate, and the same shall not descend to the heir: " It then enacts (sect. 11), that no method of assigning or transferring the stock, other than that pointed out by the Act, shall be good and available in law; and it is provided by the 12th section, that any person possessed of the stock, with the annuity attending the same, may devise the same by writing, attested by two witnesses, but that no such devisee shall receive payment, till so much of the devise as relates to the stock be entered in the proper office at the Bank; and in default of such devise, the stock and annuities attending the same shall go to the executor and administrator.

The other Acts creating new Stocks contain, almost all of them, provisions nearly similar; and these provisions have created a doubt, whether it was not the intention of the Legislature that stock should, by the Will, pass to the devisee, without the assent of the executor, and without, in the first instance, vesting in him, and being assets in his hands (j). But a series of modern decisions seems now to have established that stock, having been made personal property by the statutes, is like all other personal property, assets in the hands of the executor: and consequently, that although specifically devised, it must, in the first instance, devolve upon the executor. and, till he assents, the legatee has no right to the legacy (k). And now by stat. 33 & 34

(j) *Pearson v. Bank of England*, 3 Bro. C. C. 529. *Bank of England v. Lunn*, 15 Ves. 572, 578.

(k) *Bank of England v. Moffat*, 3 Bro. C. C. 260. *Bank of England v. Parsons*, 5 Ves. 665. *Bank of England v. Lunn*, 15 Ves. 569.

Franklin v. Bank of England, 1 Russ. Chanc. Ca. 575. 9 B. & C. 156. See also *Churchill v. Bank of England*, 11 M. & W. 323: In that case A. being possessed of 12,058*l.* 6*s.* 8*d.* New Three-and-a-Half per Cent. Stock, bequeathed to

Vict. c. 71, s. 23, it is expressly enacted that, "The interest of a stockholder dying (before or after the passing of this Act) in stock shall be transferable by his executors or administrators notwithstanding any specific bequest thereof. The Bank of England or of Ireland shall not be required to allow any executors or administrators to transfer any stock until the probate of the Will or the letters of administration to the deceased has or have been left with the Bank for registration, and may require all the executors who have proved the Will to join in the transfer."

Servants.

By the death of a master, his servant is discharged: and therefore the executors or administrators of the former can bring no action to enforce the contract of service after his death (*l*). Nor has the executor or administrator, generally speaking, any interest in an apprentice bound to the deceased. In the case of *Baxter v. Burfield* (*m*), Lee, C.J., held that an executrix could not maintain the action for debt upon bond for performance of indentures of apprenticeship on the grounds, (1) that the covenant was only to serve the master, and there was no mention of executors or administrators; (2) that the covenant was a personal covenant, and that the interest of the master in his apprenticeship is an interest coupled with a personal trust which cannot be assigned, and which determines by his death like the case of a guardian; and, lastly, that the

Apprentices.

E. C. a certain interest in 5,000*l*. parcel thereof: A judgment having been obtained against E. C., the judgment creditor obtained a Judge's order under 1 & 2 Vict. c. 110, ss. 14 and 15, charging this latter sum with the judgment debt, which upon cause shown was made absolute as to so much of the dividends as were payable to E. C. for her own use: These orders having been served upon the Bank of England, the Bank refused in consequence to pay the dividends upon the 12,058*l*. 6*s*. 8*d*. to the

executors under A's Will, and they brought an action against the Bank to recover those dividends: and the Bank then applied for a stay of proceedings on payment of a portion of the dividends:—And it was held that there was no ground or necessity for the application, the Bank being bound to pay the dividend to the legal owners, the executors who were answerable for their proper application.

(*l*) Wentw Off. Ex. 141, 14th edit.

(*m*) 1 Bott. P. L. pl. 696, 6th edit.

that, "The interest in the passing of this by his executors or specific bequest thereof. shall not be required to transfer any stock or other property of administration with the Bank for the executors who have

it is discharged: and the executors of the former cannot claim service after his death as administrators, generally bound to the deceased.

Lee, C.J., held that the action for debt upon bond of apprenticeship on the grounds, (1) that the master, and there are administrators; (2) that the interest of the apprentice coupled with a covenant which determines the term; and, lastly, that the

under A's Will, and brought an action against the executors to recover those dividends: the Bank then applied for a stay of proceedings on payment of the dividends:—And it was held that there was no necessity for the application, the Bank being bound to pay the dividends to the legal owners, the executors who were answerable for the proper application.

12th W. Off. Ex. 141, 14th edit.
Bott. P. L. pl. 696, 6th

covenant to instruct is personal and cannot extend to executors who may not be capable of instructing. The interest the master has in his apprentice is a right to his service only. The case of *Herns v. Drake* (n), was further cited by the Chief Justice as confirmatory of his statement of the law upon this point. So in *Rex v. Peck* (o), Eyre, J., said, "an apprenticeship is a personal trust between the master and servant, and it terminates by the death of either of them: and by the death of either of them the end and design of the apprenticeship cannot be attained, and it may be the executor is of another trade."

But in the case of *Cooper v. Simmons* (p), where, by indenture an infant, with the consent of his father, bound himself apprentice to a tradesman, his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of W., and with him, bound them to serve for the term of seven years, and the master, in consideration of the service of the apprentice, covenanted to teach and instruct him or cause him to be taught and instructed during the term: it was held, that on the death of the master, the apprentice was bound to serve the widow, who was his executrix, whilst she carried on the same business in the town of W., and that she was bound to teach the apprentice.

And with respect to parish apprentices, by stat. 32 Geo. III. c. 57, s. 1, after reciting that on the death of the master of any parish apprentice during the term of apprenticeship, the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues in force as far as his assets will extend, or doubts have arisen with respect thereto; it is enacted, that in case of the death of the master during the term of such apprenticeship, upon which binding no larger sum than 5*l.* shall be paid, any covenant for the maintenance of such apprentice, inserted in the indenture, shall not be in

Parish apprentices: 32 Geo. III. c. 57:

apprentice where premium does not exceed 5*l.* shall serve the executors of

H. T. 8 Ann. Not re-

(o) 1 Salk. 66.

(p) 7 H. & N. 7-7.

3 A 2

his master or
their appointee
for three
months :
or for the
remainder of
the term of
apprenticeship,
on application
to two
justices.

force longer than three calendar months next after the death of such master, &c. ; and that during such three months such apprentice shall continue to live with and serve as an apprentice the executor, &c., of such master, &c., or his appointed Sects. 2, 3 : Within such three calendar months after the death of such master or mistress, two justices, on the application of the widow, &c., may order that such apprentice shall serve the applicant during the residue of the term ; and after such order shall be made, the executors, &c., and the persons estate of the master, &c., shall be discharged from any covenant in such indenture.

Copyright :

An interest in the testator's literary property and also certain works of art may devolve on the executor pursuant to several statutes (q). An interest may also vest in him by virtue of a patent granted to the testator, for the invention of a new manufacture within the realm (r). It seems to have been questioned whether a carroome, or a licence to the Mayor of London to keep a cart, is a chattel interest and belongs to the executor, or whether it goes to the heir (s).

Patent :

Carroome :

Rent :

When a man *scised in fee* makes a gift in tail, or lease for life or for years, reserving rent, the whole rent which becomes due after his death shall go with the reversion (as an incident thereof) to his heir, and not to his executor : for since, during

(q) 5 & 6 Vict. c. 45, as to Copyright in Books ; 54 Geo. III. c. 56, as to Busts and Sculptures ; 8 Geo. II. c. 13. 7 Geo. III. c. 38. 17 Geo. III. c. 57. 6 & 7 Wm. IV. c. 59, as to Engravings and Prints. 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65, as to Printed Linens, Muslins, &c., and 25 & 26 Vict. c. 68, as to Paintings, Drawings, and Photographs.

(r) Toller, 152. By the Patents Act, 1883, 46 & 47 Vict. c. 57, s. 34, if a person possessed of an invention dies without making application for a patent for the

invention, application may be made by, and a patent for the invention granted to, his legal representative. Every such application must be made within six months of the decease of such person, and must contain a declaration by the legal representative that he believes such person to be the true and first inventor of the invention. This alters the law laid down in *Marsden v. Street Foundry*, 3 Ex. D. 293.

(s) Com. Dig. Biens (B). *Hunt v. Hunt*, 2 Vern. 83.

executors: the rent accruing after shall be apportioned between his heir and his executors (*x*).

Where no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them and not to the heir (*y*). Thus a tenant for three lives, to him and his heirs, assigned over his whole estate, reserving to himself, his executors, administrators, and assigns, a rent of 10*l.* with a proviso, that upon non-payment the assignor and his heirs might re-enter; and the assignee covenanted to pay the rent to the assignor, his executors and administrators: The question was, whether this rent should go to the heir or executor of the assignor: It was decreed by Sir J. Jekyll, that the rent should go to the executor, as it was reserved to him, and there was no reversion left in the assignor to which the rent was incident, so as to carry it to the heir: It was also held, that the covenant to pay the rent to the executors and administrators of the assignor was good and binding, both in law and equity: And though the proviso was, that in case of non-payment of the rent, the assignor and his heirs might re-enter, yet the Court thought this immaterial, as in equity the heir must, in this case, be looked upon as a trustee for the executor: This case came on again before Lord King, who was of opinion that, there being no reversion, the rent might be well reserved to the executors during three lives; and decreed accordingly (*z*).

If a lessee for a term of years under-leases for a term exceeding in length that for which he himself holds, and the under-lessee covenants to pay rent to such lessee, his executor

(*x*) *Gilb. Rents*, 188. *Moodie v. Garnance*, 3 *Bulstr.* 153, where the Court is said to have clearly agreed upon the apportionment, that by act of law this may well be. It was agreed in *Dumpor's* case, that if a man seised of two acres, the one in fee, and the other in Borough-English, has issue two sons, and leases both acres for life

or years, rendering rent with condition, and the lessor dies; in this case, by this descent, which is act of law, the reversion, rent, and condition are divided: 4 *Co.* 120, *b*, *Co. Lit.* 215, *a*.

(*y*) 3 *Cruise's Dig.* 321, 3rd edit.

(*z*) *Jennison v. Lord Lexington*, 1 *P. Wms.* 555.

shall be apportioned

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over his whole estate,
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Co. Lit. 215, a.
Cruise's Dig. 321, 3rd edit.
nnison v. Lord Lexington,
ns. 555.

may sue the under-lessee for rent accruing during the con-
tinuance of the lessee's term (a).

If the rent be reserved for years, and be severed from the
reversion, it may then go to the executor or administrator,
although the reversion goes to the heir: Thus if a man,
seised of land in fee, makes a lease for years, reserving rent,
and afterwards devises the rent to a stranger and dies, and
the stranger is seised of the rent and dies, his executors shall
have this rent and not his heirs (b).

Again, though the whole rent, which accrues after the
death of the lessor, shall, in the cases above mentioned, go
with the reversion to the heir, yet the arrearages of rent,
which incurred and became payable in the lifetime of the
testator or intestate, shall, in all cases, go to his executor or
administrator as part of his personal estate (c).

The executors or administrators of tenant for life of a
rent-charge, and of tenant *pur autre vie* after the death of
cui que vie, might bring debt to recover the arrears of such
rent by the common law, although they could not formerly
distrain for them (d): but before the statute 32 Hen. VIII.
c. 37, the executor or administrators of a man seised of a
rent-service, rent-charge, rent seck, or fee farm, in fee-simple
or fee-tail, had no remedy for the arrears incurred in the
lifetime of the testator or intestate (e). By that statute a
double remedy is provided for them, *viz.*, either to distrain or

Arrears of rent
shall go to the
executor:

(a) Baker v. Gostling, 1 Bingham, 19.

(b) Knolle's case, Dyer, 5, b.
(c) 3 Bac. Abr. 63. Executors
(H. 3). Wentw. Off. Ex. 129, 14th
edit. Godolph. Pt. 2, c. 13, s. 3.

(d) Co. Lit. 162, b, and Har-
grave's note. 1 Saund. 281, note
(1). It is said in Bacon's Abr.
tit. Executors (N.), tit. Debt. (C.),
that at common law an executor
had no remedy for recovering of
rent arrear in the lifetime of the
testator; but this appears a mis-

take; for, before the statute of
Hen. VIII., if the lease was for
years or the life of the testator,
it should seem that the executor
might have brought debt, and was
only remediless in the case of his
testator being seised of a rent in
fee-simple or fee-tail, or *pur autre
vie* as long as the estate of freehold
continued: See Gilbert on Rents,
98. 1 Saund. 281, n. (1) to Duppa
v. Mayo.

(e) Co. Lit. 162, a. 1 Saund
282, note (1) to Duppa v. Mayo.



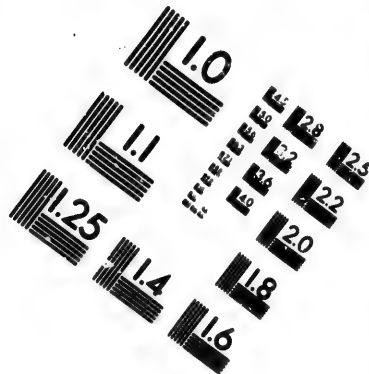
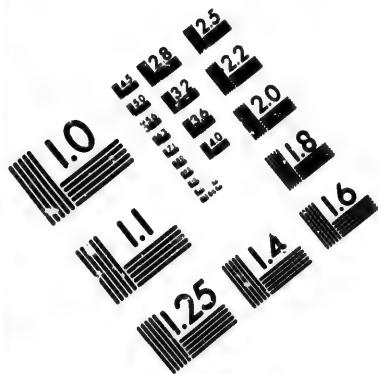
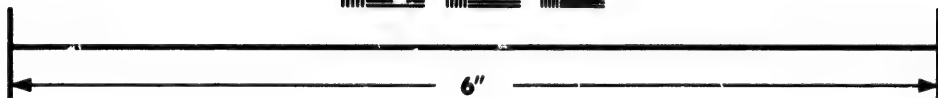
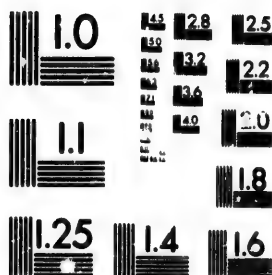


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have an action of debt (*f*). The statute also gives, in terms, the same double remedy to the executors of tenant for term of life of rent-charges, &c.; from which, at first view, it might be inferred that the executors of tenant for life could not bring debt at common law. But these words have, by the best authorities, been considered to refer only to tenants *pur autre vie* so long as *cestui que vie* lives (*g*).

Formerly
important to
ascertain when
rent was due,
so as to go to
the executor or
administrator.

With relation, then, to the title of the executor or administrator, at common law, to the arrears of rent accrued in the lifetime of the deceased, it used to be important to ascertain the precise period at which rent might be said to be due, so as to go to the personal representative, because generally there was no apportionment in his favour as against the heir or remainderman.

Before the passing of any of the Apportionment Acts, the non-apportionment of rent often worked great hardship. Thus, if the testator died before midnight on the day on which the rent was payable, no part of such rent was recoverable by the executor, and, in the case of a rent continuing after the death of the testator, the whole rent passed with the reversion to the remainderman or the heir, and in the case of rents reserved on leases determining on the death of the person making them, or on the death of the tenant *pur autre vie*, the rent was lost altogether. Similar hardships arose in respect of annuities and other payments such as pensions, dividends, moduses, and compositions, coming due at fixed periods. Most of these hardships were gradually remedied by legislation, which provided not only for the apportionment, but also for remedies for the recovery of the apportioned parts by the parties entitled thereto, notably by stats. 11 Geo. II. c. 19, and 4 Will. IV. c. 22; but these statutes omitted to deal with some cases, and questions were constantly arising as to what cases fell within the enactments. Now, however, the Appor-

(*f*) Co. Lit. 162, a. See a more particular exposition of this statute, *infra*, Pt. III. Bk. I. Ch. I.

(*g*) See Hargrave's notes to Co.

Lit. 162, a, 162, b. 1 Saund. 282, note (1) to *Duppa v. Mayo*. See section 4, of this statute, *infra* Pt. III. Bk. I. Ch. I.

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a, 162, b. 1 Saund. 282,
to Duppa v. Mayo. See
of this statute, *infra*
k. I. Ch. 1.

tionment Act, 1870 (33 & 34 Vict. c. 35), has been passed in such comprehensive terms that the cases as to the construction of the former Acts have ceased to be of any importance : and, therefore, that portion of former editions of this Work relating to them has been omitted.

By stat. 33 & 34 Vict. c. 35 (the Apportionment Act, 1870), after reciting that whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have passed, *viz.*, 11 Geo. II. c. 19, 4 & 5 Wm. IV. c. 22, 6 & 7 Wm. IV. c. 71, 14 & 15 Vict. c. 25, and 23 & 24 Vict. c. 154, and whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences it is enacted :—

SECT. 2. From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments (m) in

Apportionment Act, 1870, 33 & 34 Vict. c. 35. Rents, &c., to accrue from day to day, and to be apportionable in respect of time.

Apportioned part of rent, &c., to be

(m) The "other periodical payments" must be payments recurring at fixed times, not at variable periods nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation, and must be the nature of income, *i.e.*, coming in from some kind of investment. There must be a change in ownership, a change in investments is not sufficient to bring it within the Apportionment Act. *Re Clarke*, 18 C. D. 160.

The income of a share in a private iron company regulated by a deed of partnership under which the accounts were made up yearly, the profits for the previous year ascertained and the dividend to be paid decided by the managing partner, is not a dividend or a periodical payment within the meaning of this section. *Jones v. Ogle*, L. R. 8 Ch. 192.

Nor are the "net profits of a newspaper" (the mode and time of ascertaining and dividing which are wholly in the discretion of trustees) : *Re Cox's Trusts*, 9 C. D. 159. But payments by way of bonus or surplus profits to the shareholders of a public company (even though such payments may be only occasional and the period of payment may be varied by resolution) are "dividends" within this section. *Re Griffith*, 12 C. D. 655. The income arising from personalty specifically bequeathed is not apportionable under this Act as between the specific legatee and the estate of the testator : *Whitehead v. Whitehead*, L. R. 16 Eq. 529. This Act applies to a specific as well as to a residuary devise. *Hasluck v. Pedley*, L. R. 19 Eq. 271.

payable when
the next
entire portion
shall have
become due.

the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Persons shall
have the same
remedies for
recovering
apportioned
parts as for
entire
portions.

4. All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity.

Proviso as to
rents reserved
in certain
cases.

Interpretation
of terms.

5. In the construction of this Act—

The word "rents" includes rent service, rent-charge, and rent seek, and also tithes and all other periodical pay

d or made payable under
e) shall, like interest on
g from day to day, and
ne accordingly.

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or other hereditaments of
her hereditaments, shall
tioned part forming part
aforesaid specifically, but
uding such apportioned
ed by the heir or other
apportionable under this
entitled to such entire or
d part shall be recover-
y the executors or other
e same by action at law

service, rent-charge, and
all other periodical pay-

ments or renderings in lieu of or in the nature of rent or title.

The word "annuities" includes salaries and pensions.

The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies (*n*), divisible between all or any of the members of such respective companies, whether such payments shall usually be made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purpose of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

6. Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

7. The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place (*o*).

(*n*) This will include any public company, but not a private partnership: *Re Griffith*, 12 C. D. 655. *Jones v. Ogle*, L. R. 14 Eq. 419. 8 Ch. 192.

A life assurance society, unincorporated, but established by a deed of settlement, with a board of directors, capital, and a list of shareholders, and possessing certain powers and concessions under a special Act of Parliament, is a "public company" within the meaning of this section: *Re Griffith*, 12 C. D. 655.

(*o*) As to whether the effect of this Act is retrospective, the case of *Capron v. Capron*, L. R. 17 Eq. 288, decides that where a testator

seised in fee devised real estate by a Will dated before the Act, and confirmed by a codicil dated after the Act, the rents were apportionable between the executor and devisee. It was also held by Jessel, M.R., in *Hasluck v. Pedley*, L. R. 19 Eq. 271, that the Act applied to a devise contained in a Will dated before the Act to which a codicil was made after the Act, and, *semble*, the result would have been the same without the codicil. This was followed in *Constable v. Constable*, 11 C. D. 681. "The Act in my opinion applies to all cases whether the instrument under which the question arises came into opera-

Act not to
apply to
policies of
assurance:

nor where
stipulation
made to the
contrary.

Copyhold
fines, &c.

If the lord of a manor admit a copyholder, whereupon a fine is set, and the lord die before the fine be paid, it will belong to his executors, who may bring an *assumpsit* or debt for it (*p*): for it is a fruit fallen, and shall not go with the inheritance. So also of reliefs and heriots (*q*).

Reliefs.
Heriots.

Money col-
lected on briefs
for charity :

A copyhold estate entailed, consisting principally of a house, having been burnt down, a sum of money was collected on briefs, towards the rebuilding, and paid by the trustees of the charity, into the hands of the guardian of tenant in tail, who was an infant, and died under age, without its having been so applied: a question arose between the personal representatives of the infant, and those entitled to the estate under the settlement: and it was held that the money should go to the latter; but that allowance should be made to the former for the amount of the interest of the money, from the time it was paid to the guardian to the death of the infant (*r*).

damages
recovered by
trustees
during a
tenancy for
life belong to
the executor
of the tenant,
and not to the
inheritance.

In *Noble v. Cass* (*s*), a testatrix devised to trustees and their heirs upon trust for her daughter during her life; and after her decease on trust for her niece, for life; and after the decease of her niece on trust for the children of the niece in fee: The testatrix had granted a lease of the premises devised for a term still subsisting: After the death of the daughter, and during the lifetime of the niece, the trustees brought an action against the lessee for a breach of the covenants of that lease, by reason of dilapidations, and recovered 500*l* damages: Afterwards the niece died: and it was held by Sir L. Shadwell, V.-C., that the sum so recovered belonged to her administrator.

Sole
corporation :

In the case of a sole corporation, as a bishop, parson,

"tion before or not till after the
"passing of the Act," *per* Malins,
V.-C., in *Re Cline's Estate*, L. R.
18 Eq. 213, 214: a case decided *ex*
parte but followed and approved
by Pearson, J., in *Lawrence v.*
Lawrence, 26 C. D. 795.

(*p*) *Shuttleworth v. Garnet*, 3
Lev. 261, 262.

(*q*) *Andrew Ognel's case*, 4 Co.
49, b. Co. Lit. 47, b. 83, a, b,
162, b. 1 *Watk. Cop.* 322, note (*f*).

(*r*) *Rook v. Warth*, 1 Ves. Sen. 460.

(*s*) 2 Sim. 343.

holder, whereupon a fine be paid, it will in *assumpsit* or debt shall not go with the *ts* (q).

ing principally of a of money was col- g, and paid by the of the guardian of died under age, with- on arose between the nd those entitled to t was held that the at allowance should f the interest of the guardian to the death

ised to trustees and during her life; and for life; and after the ldren of the niece in the premises devised ath of the daughter, trustees brought an of the covenants of and recovered 500l and it was held by Sir recovered belonged to

as a bishop, parson, littleworth v. Garnet, 3 262.

drew Ognel's case, 4 Co. o. Lit. 47, b, 83, a, b, Watk. Cop. 322, note (f) k v. Warth, 1 Ves. Sen. 460. m. 313.

Ch. I. § II.] Choses in Action—Apportionment.

733

vicar, master of an hospital, &c., no *chose in action* can go in succession; for the successors shall no more have them than the heirs of a private man; since succession in a body politic is inheritance in case of a body private (t). Therefore a bond given by an administrator under the Statute of Distributions to the Ordinary passed, on his death, to his executor and not to his successor (u). But by custom a *chose in action* may go in succession to a sole corporation; as in London, where the Chamberlain is a special corporation for taking bonds for the benefit of the Orphanage Fund, which has been frequently adjudged a good custom (v): But he cannot take a bond to himself or his successors for any other purpose (x). By the charter granted to the College of Physicians, and confirmed in Parliament, the offenders in practising physic in London without admission by the College of Physicians shall forfeit 5*l.* for every month, *unum dimidium regi et alterum dimidium dicto presidenti et collegio*; on this charter it was holden that if the President of the College recovers in debt against an offender and dies, the successor shall have a *scire facias* to execute it, and not the executor; for the predecessor recovered it as due to him and the College (y).

chose in action goes to his executor, and not his successors.

There has already been occasion to observe, that survivorship holds place, as well between joint-tenants of chattel property in possession or in action, as between joint-tenants of inheritance or freehold (z). Hence the general rule is, that the interest which the testator had in a *chose in action* jointly with another, shall not pass to his executor (a): yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favour of merchants, which has been extended to all traders, and persons engaged in joint

Interest in joint *choses in action* does not pass to executors.

(t) Fulwood's case, 4 Co. 65, a.

(x) 2 Black. Comm. 432.

(u) Howley v. Knight, 14 Q. B. 240.

(y) Atkins v. Gardner, Cro. Jac. 159.

(v) Byrd v. Wilford, Cro. Eliz. 464, 682. Fulwood's case, 4 Co. 65, a.

(z) *Ante*, p. 570.

(a) See Southcote v. Hoare, 3 Taunt. 87.

undertakings in the nature of trade (b). But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the *remedy* survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased (c). This question will be more fully investigated hereafter, together with the subject of remedies by executors and administrators generally (d).

Choses in action vested at law in the executor, though assigned by the deceased.

Now by the Judicature Act *choses in action* assignable.

In conclusion, it may be observed, that according to the old law, although the deceased had, in his lifetime, assigned all his interest in his *choses in action*, still upon his death they would vest, at law, in his executor or administrator; because at law *choses in action* were not assignable. But now, by the Judicature Act, 1878, sect. 25, sub-sect. 6, it is enacted that "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *choses in action* of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *choses in action*, shall be, and be deemed to have been effectual in law [subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed], to pass and transfer the legal right to such debt or *choses in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or *choses in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *choses in action*, he shall be entitled, if he think fit, to call upon the several

(b) *Ante*, p. 571.

(c) *Martin v. Crompe*, 1 Lord

Raym. 340.

(d) *Infra*, Pt. v. Bk. I. Ch. I.

But in these cases, the right devolves on his executor, and the remedy survives to the right by action, and is transmitted to the executor of the deceased (c). This is the rule hereafter, together with administrators and administrators.

At according to the statute, assigned to him for his lifetime, assigned to him still upon his death as administrator; be-assignable. But now, in sub-sect. 6, it is provided that by writing under the hand of the debtor to be by way of chose in action of

has been given to the assignor, from whom the assignor claims such debt or who has been effectually assigned, would have been assigned if this Act gave legal right to such notice, and all the power to give concurrence of the debtor, trustee, or administrator, or chose in action is disputed by the statute, or of any other chose in action, upon the several

persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

The executor of a bankrupt is not entitled to his choses in action, for they are vested in the trustee in the bankruptcy, for, where any part of the property of a bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee (e).

Executor of bankrupt.

In cases of wreck, by the stat. Westm. I. (3 Edw. I. c. 4), if any one proves property in the wrecked goods within a year and a day, they shall be restored to him without delay. The year and a day, within which the owner may prove his property, shall be computed from the seizure, as wreck: And if the owner dies within that time, his executor or administrator may prove his property (f).

Wrecked goods.

An instance occurs of a claim, founded on contract, which might have been enforced by the deceased, while alive, and yet is not transmitted to the executor or administrator in the case of arrears of pin-money, to which the wife herself may be, to some extent, entitled, but which, as there has been already occasion to show (g), cannot be recovered, to any extent whatever, by her personal representatives. Again, it does not appear to be satisfactorily settled that the Court will allow the personal representatives of a wife to enforce payment of the arrears of alimony against the husband; and it has been held that they cannot sustain a bill in equity for that purpose (h).

Instances of rights not transmissible to executors:

arrears of pin-money: Alimony.

(e) Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 50 (5).

(f) 2 Inst. 160. Com. Dig. Wreck (A). This statute has now been repealed.

(g) Ante, p. 673.

(h) Stones v. Cooke, 8 Sim. 321,

note (g), where Lord Lyndhurst reversed the decision of the V.-C., 7 Sim. 22. De Blaquiére v. De Blaquiére, 3 Hagg. 322. Wilson v. Wilson, 3 Hagg. 329, note (c). Vandergucht v. De Blaquiére, 5 M. & Cr. 229, 241.

SECTION III.

The Right of an Executor or Administrator to Choses in Action, as it respects Husband and Wife.

In considering the right of an executor or administrator to choses in action, as it concerns the relation of husband and wife, it may be proper, although the subject has become of less importance than formerly by reason of the Married Women's Property Act, 1882, to pursue the course employed in a previous part of this Treatise, with respect to chattels real; and to investigate, 1. The right of the executor or administrator of the husband to the choses in action of the wife, when the wife survives: 2. The rights of the administrator of the wife, when the husband survives.

By the Married Women's Property Act, 1882, 45 & 46 Vict. cap. 75, sect. 1 (1), it is enacted:

Law since
Married
Women's
Property Act,
1882.
Stat. 45 & 46
Vict. c. 75,
s. 1 (1).

"A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by Will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Sect. 2.

By section 2:

"Every woman who marries *after* the commencement of this Act (1 Jan., 1883) shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid (*i.e.* as in sect. 1 (1)) all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage."

Sect. 5.

By section 5:

"Every woman married *before* the commencement of this Act (1 Jan., 1883) shall be entitled to have and to hold and to dispose of in manner aforesaid (*i.e.* as in sect. 1 (1)) as her separate property all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act" (1 Jan., 1883).

And by Section 19 :

Sect. 19.

Administrator to *Choses in Action of Wife.*

Executor or administrator of the relation of husband and wife. The subject has become the reason of the Married Women's Act, the course employed with respect to chattels of the executor or administrator of the *choses in action* of the rights of the administrator survives.

Act, 1882, 45 & 46 Vict.

ance with the provisions holding, and disposing, of personal property as her as if she were a *feme sole* trustee."

the commencement of the estate to have and to hold the same in manner aforesaid of in manner aforesaid and personal property of marriage or shall be affected by marriage."

commencement of this estate to have and to hold and the same as in sect. 1 (1) as to personal property her title shall accrue after the death (1883).

"Nothing in this Act contained shall interfere with, or affect, any settlement, or agreement for a settlement, made, or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with, or render inoperative, any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, Will, or other instrument."

The result of these four sections will be that with regard to such property as by sections 2 and 5 is made the separate property of the wife, the husband will not be able, if he survive her, to claim such property *jure mariti*, but only as administrator of his wife, and this equally, whether the property consists of chattels in possession, or *choses in action*, and whether or not the *choses in action* have been reduced into possession: but inasmuch as, if a woman married before the commencement of the Act has before that date acquired a title, whether vested or contingent and whether in reversion or remainder, to any property, such property is not made her separate estate by section 5 of the Act, it is thought convenient to reprint the substance of the text as it existed in former editions.

General effect of M. W. P. Act, 1882.

Law as to choses in action of the wife not affected by the Married Women's Property Act, 1882.

Law prior to Married Women's Property Act, 1882.

1. When the wife survives.

Property falling under the description of *choses in action* of the wife are debts owing to her on bond or otherwise, arrears of rent, legacies, trust funds, residuary personal estate, money in the funds, and other property recoverable by action or suit.

When the wife survives.

Marriage is only a qualified gift to the husband of the wife's *choses in action*: viz., upon condition that he reduce them into possession during its continuance; for if he happen

General rule, that her *choses in action* not reduced into

possession
shall survive
to her :

to die before his wife, without having reduced such property into possession, she, and not his executors or administrators, will be entitled to it (i).

Accordingly, the general rule of law is, that *choses in action*, which are given to the wife, *either before or after marriage*, survive to her after the death of her husband, provided he has not reduced them into possession : but with this distinction, that as to those which come during the coverture, the husband may, for them, bring an action in his own name ; may disagree to the interest of the wife ; and that recovering in his own name is equal to reducing them into possession (k).

Instances :
Bond to the
wife *dum sol.* :

Thus, in *Lawrence v. Beverleigh* (l), a bond to the wife *dum sola* was by the marriage articles to be paid to the baron after twelve months, and he to purchase lands with it, and settle it on himself and his wife, and the heirs of their two bodies, remainder to the heirs of the baron : They had issue a daughter : the husband died, and the daughter died : The bond unaltered, being a *chose in action*, survived to the wife, and was not liable at law to bond creditors, nor was the interest due thereon.

bond to hus-
band and wife
during cover-
ture :

So if an obligation be made during coverture to husband and wife, and the husband dies, the wife shall have it by survivorship, and not the executors of the husband (m).

(i) Co. Lit. 351, a. 1 Roper, 204. *Osborn v. Morgan*, 9 Hare, 432, 433. The rule applies to the arrears of the wife's income, they being *choses in action* : *Wilkinson v. Charlesworth*, 10 Beav. 324.

(k) *Garforth v. Bradley*, 2 Ves. Sen. 676, 677. *Richards v. Richards*, 2 B. & Adol. 452. The law, however, concerning a married woman's property was somewhat modified by stat. 33 & 34 Vict. c. 93. See *ante*, p. 660, note (x).

(l) 2 Keb. 841, cited in *Baden v. Lord Pembroke*, 2 Vern. 55.

(m) 1 Roll. Abr. 349, tit. Baron and Feme (B.), pl. 1. *Norton v. Glover*, Noy, 149. *Coppin v. —*, 2 P. Wms. 497. Com. Dig. Baron and Feme (F. 1). So if one is bound to baron and feme in a statute merchant, and the baron dies, the statute shall survive to the feme, and she shall have execution, and not the executor of the baron : Bro. Baron and Feme, pl. 24. So the feme shall have a recognizance by survivorship : 1 Roll. Abr. 349, pl. 2.

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ors or administrators,

w is, that *choses in*
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e husband (*m*).

Roll. Abr. 349, tit. Baron
e (B.), pl. 1. Norton v.
oy, 149. Coppin v. —,
497. Com. Dig. Baron
e (F. 1). So if one is
baron and feme in a sta-
bant, and the baron dies,
te shall survive to the
she shall have execu-
not the executor of the
ro. Baron and Feme, pl.
the feme shall have a
ce by survivorship : 1
349, pl. 2.

Again, if a bond is given to the wife alone during coverture, the bond, on the death of the husband, will survive to the wife, and his executors shall not have it (*n*).

bond to wife
alone during
coverture :

And it may be stated, generally, that a married woman, though incapable of making a contract, is capable of having a *chose in action* conferred on her, which will survive to her on the death of her husband, unless he shall have interfered by doing some act to reduce it into possession (*o*).

choses in ac-
tion, generally,
given to wife
during cover-
ture :

If a *feme sole* be the payee or endorsee of a promissory note or bill of exchange, and afterwards marry, it has been laid down, that by act of law it becomes the sole right and property of her husband (*p*), but a bill or note given to the wife before marriage will survive to her, provided her husband has not reduced it into possession (*q*).

bill or note
given to feme
covert dum
sola :

Where a bill or note is made or endorsed to a *feme covert* during her coverture, it is said to vest in her husband (*r*). Such a note or bill will pass by the indorsement of the husband alone, during the coverture (*s*) : And the husband may sue on it in his own name only (*t*) : He, however, may, if he pleases, join his wife as a party in suing on the instrument (*u*) ; and consequently, if he should in such case die after judgment, and before execution, the judgment would survive to her. But on the point whether, if he neglected to sue upon it, the bill or note would go to his executors, or survive to his wife, the authorities were in some degree conflicting ; but the more modern ones are conclusive in favour of her right of survivorship, and the rule of law has been since considered as fully settled, that if there be a bill or note made to a

bill or note
given to feme
covert during
coverture.

(*n*) Day v. Pargrave, cited by Dampier, J., in *Philliskirk v. Pluckwell*, 2 M. & S. 396, 397. 1 Roll. Abr. 345, tit. Baron and Feme (H.), pl. 7. Checkley v. Checkley, 2 Show. 247.

(*o*) Dalton v. Midland Counties Railway Co., 13 C. B. 474, 478.

(*p*) Connor v. Martin, cited 3 Wils. 5.

(*q*) Sherrington v. Yates, 12 M.

& W. 855. Hart v. Stephens, 6 Q. B. 937.

(*r*) Barlow v. Bishop, 1 East, 433. See *ante*, p. 660, note (*x*).

(*s*) Mason v. Morgan, 2 Adol. & Ell. 30.

(*t*) Burrough v. Moss, 10 B. & C. 588. *Ante*, p. 738.

(*u*) *Philliskirk v. Pluckwell*, 2 M. & S. 393.

married woman during coverture, the husband might sue alone upon it, or permit his wife to take an interest in it; in which latter case it stood on the same footing as if it had been made to her before coverture (x).

Stock

The rule above stated, as to the wife's title to her *chores in action* by survivorship, may be further exemplified by the instance of stock. Thus, in *Seawen v. Blunt* (y), A. was entitled under the Will of C. to real estates for life, but if she married, the fee simple was given to her: if she did not marry, the property was given over after her death to B. the wife of D., and her heirs: The estate was sold with the consent of all parties interested in it, but in the conveyance no trust was declared of the purchase money, which was paid to A., and by her delivered to trustees, who invested it in stock, and the interest of it was paid to A., who was unmarried when the bill was filed: B. survived her husband D., and bequeathed to A. all her personal estate: Sir William Grant, M. R., determined, that the rights of the persons named in the Will, in the stock, were the same as they had in the land under the same Will, upon the doctrine of resulting trusts; that the stock was in the nature of a *chose in action*, which not being reduced into possession by D., survived to his wife B., and passed by her Will to A., who thereby became entitled to the money absolutely (z).

Accordingly, as there has already been occasion to point out (a), if a husband purchases stock in the funds, in the joint names of himself and his wife, and dies, his wife is entitled to it by survivorship, to the exclusion of her husband's executors.

Arrears of
rent.

Another strong illustration of the general principle is to be found in the wife's right, in certain cases, to arrears of rent accrued in the lifetime of her husband, in preference to her husband's executors. Thus if the husband die before

(x) *Howard v. Oakes*, 3 Exch. 136. *Fleet v. Perrins*, L. R. 4 Q. B. 500. See also notes to Saunders, vol. i., p. 123, n. (a).

(y) 7 Ves. 294.

(z) See 1 Roper, *Husb. & Wife*, 204, 2nd edit.

(a) *Ante*, p. 669.

husband might sue alone interest in it; in which as if it had been made

wife's title to her *choses* her exemplified by the *v. Blunt* (y), A. was estates for life, but if to her: if she did not for her death to B. the estate was sold with the, but in the conveyance also money, which was trustees, who invested a paid to A., who was survived her husband. al estate: Sir William rights of the persons the same as they had the doctrine of resulting re of a *ch. in action*, ion by D., survived to ill to A., who thereby ly (z).

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Ves. 294.
e 1 Roper, Husb. & Wife,
t edit.
nte, p. 669.

the wife, and rent is in arrear, which was reserved to them jointly on an underlease of the wife's leasehold estate, she will not only, as it has before appeared (b), be entitled to the accruing rent, but also to the arrears; because they, remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal, the term, survive to the wife (c). But if she were not a party to the derivative lease, or if she were a party, and the rent was reserved to the husband alone, then, as well the arrears as the future rent will belong to the executors or administrators of the husband (d). So if a lease be made by the husband and wife, of her freehold estate, not conformable to the statute 32 Hen. VIII. c. 28, and after his death she elects to confirm it, she is, it seems entitled to the arrears of rent (e). Likewise, if a woman leases her land, (for life or years,) reserving rent, and afterwards takes husband: after the death of the husband, the wife shall have the arrearage of rent incurred during the coverture, and not the executors of the husband (f).

So if a husband be seised of a rent-service, rent-charge, or rent-seck, in the right of his wife, and the rent be in arrear during the coverture, and then the husband dies, the wife shall have the arrearage, and not the executors of the husband (g); because the principals which survived to her carried also all that was due in respect of them (h). So if baron and feme are seised of a rent-service for their lives, rent incurs, and afterwards the baron dies, the feme shall have the arrearage during the coverture (i).

(b) See *ante*, p. 611, note (p).

(c) 1 Roper, Husb. & Wife, 175, 2nd edit.

(d) *Ante*, p. 611. 1 Roper, Husb. & Wife, 174, 2nd edit.

(e) 1 Roll. Abr. 350, tit. Baron and Feme (D.), pl. 4.

(f) 1 Roll. Abr. 350, tit. Baron and Feme (D.), pl. 2, pl. 5.

(g) Co. Litt. 351, b. 1 Roll. Abr. 350. Baron and Feme (D.),

pl. 1.

(h) Temple v. Temple, Cro. Eliz. 791. Salwey v. Salwey, Amb. 692. Carew v. Burgoyne, 1 Roll. Abr. 350. Baron and Feme (D.), pl. 8. 1 Roper, Husband and Wife, 201, 2nd edit.

(i) 1 Roll. Abr. 350. Baron and Feme (D.), pl. 3. Temple v. Temple, Cro. Eliz. 791. Dembyn v. Brown, Moor. 887.

In these cases it should be observed, that if the rent had been received during the coverture, it would have become the absolute property of the husband; Therefore, where a feme leased for life, reserving rent, and took husband, and during the coverture a receiver received the rent of the lessee, (it does not appear by whom he was made receiver, but it seems to be intended that he received it for the baron and feme,) and after the baron died: it was held, that the executors of the baron should have the writ of account against the receiver and not the feme; for this was a chattel and duty in the baron by the receipt (*k*).

Tithes.

Where the husband was seised or possessed of tithes in the right of the wife, or jointly with his wife, and the husband died, it was held that the wife, and not the executors of the husband, should have an action for the subtraction of such tithes (*l*); but that if the tithes were once set out, and severed from the nine parts, then they became a chattel vested in the husband (*m*).

Estray.

If any estray comes into the manor of the wife, and the husband dies before seizure, the wife shall have it; for that the property was not in her before seizure (*n*).

Orphan's
portion in
Chamber.

The portion of an orphan of the Chamber of London, if the husband dies without altering the property, shall go to the feme (*o*).

Husband and
wife lost in
the same ship

In *Hitchcock v. Beardsley* (*oo*), a father, upon the marriage of his daughter, gave a bill of exchange for 1,200*l.* as a marriage portion, and the husband agreed to settle it upon the wife, within three or four years after the marriage: The husband and wife, within three years after their marriage, embarked in the same vessel for Corunna, and the vessel, with all the crew and passengers, was lost on the voyage: The question was whether the representative of the husband

(*k*) 1 Roll. Abr. 350, tit. Baron and Feme (D.), pl. 6.

(*l*) *Forrd v. Pomroy*, Noy, 136.

(*m*) *Anon.* Ley. 70.

(*n*) Co. Lit. 351, *b*.

(*o*) *Pheasant v. Pheasant*, 1 Chanc. Cas. 161.

(*oo*) *West's Cas. temp. Hard.* 445.

or of the wife was entitled to receive the 1,200*l.*: Lord Hardwicke, though it became unnecessary to decide the point, inclined to be of opinion, that the husband having by the bill of exchange the legal right to the money, and not being obliged to settle it on his wife within three or four years, and she dying within that time, the representatives of the husband had the stronger right, and the rather, because in order to make a trust arise for the wife, so as to give her representatives any right to take away the legal interest, it should be shown on their part that she survived (*p*).

Having thus brought forward examples of the rule that the wife's *choses in action* will not pass to her husband's executors, unless he reduced them into possession in his lifetime, it is now proposed to consider what will be such a reduction of them by the husband into possession, as will defeat the wife's right to them by survivorship.

It must be observed, that all questions between the wife and those who claim *by assignment* from the husband relate to the Law of Husband and Wife, and are foreign to the Law of Executors and Administrators. The cases, which properly belong to this Treatise, are confined to those, in which the question is between the wife and the personal representatives of her husband, where the latter claim to exclude her right, as survivor, by some act which is asserted to have reduced the *choses in action* into the possession of the husband himself. But as the decisions, relating to the validity of assignments by the husband of his wife's *choses in action*, are illustrative of the rules established in respect of the efficacy of acts amounting to reduction into his own possession, some of the principal modern cases on the former subject will be found collected in the note below (*q*).

(*p*) As to the law respecting the question of survivorship in a case of this description, see *post*, Part III. Bk. III. Ch. II. § v. (1). See also the cases collected *ante*, p. 402, note (*q*).

(*q*) It is now fully settled that the husband cannot, even for valuable consideration, assign or release the wife's reversionary *choses in action*, so as to bind her survivors: *Purdev v. Jackson*, 1 Russ.

What amounts to reduction of the wife's *choses in action* into possession by the husband:

state. [Pt. II. Bk. III.]

that if the rent had would have become Therefore, where a ad took husband, and red the rent of the e was made receiver, ived it for the baron t was held, that the the writ of account for this was a chattel

possessed of tithes in wife, and the husband the executors of the e subtraction of such e once set out, and became a chattel vested

of the wife, and the hall have it; for that re (*n*).

number of London, if property, shall go to

er, upon the marriage ge for 1,200*l.* as a eed to settle it upon r the marriage: The after their marriage, nna, and the vessel, lost on the voyage: atative of the husband

Lit. 351, b.
asant v. Pheasant, 1
as. 161.
est's Cas. temp. Hard. 445.

Mere
intention
insufficient:

In the first place it must be remarked, that a mere intention to reduce the wife's *choses in action* into possession

1. *Honner v. Morton*, 3 Russ. 65.
Watson v. Dennis, 3 Russ. 90.
Crowder v. Stone, 3 Russ. 224.
Stiffe v. Everitt, 1 M. & Cr. 37.
Rogers v. Acaster, 14 Beav. 445.
 See also *Winter v. Easum*, 2 De G. J. & Sm. 272. And the rule is the same though the wife is ready to consent in Court: *Box v. Box*, 1 Dru. 42. *Box v. Jackson*, *ibid.* 48, *coram* Sugden, C. of Ireland, who reviewed all the previous authorities. This rule has been understood to be subject to the qualification that if by any course of circumstances the husband is afterwards in a condition to reduce the assigned *choses in action* into possession, the assignment will then have full effect: on the equitable principle of considering that as actually done which the husband has agreed to do by the assignment: 3 Russ. 86. But it was held by Shadwell, V. C., on several occasions, that in case of an assignment by the husband of a *choses in action* of the wife, as well *present* as *reversionary*, if the husband dies before the *choses in action* has actually been reduced into possession, the assignment will be inoperative as against the surviving wife: *Hutchins v. Smith*, 9 Sim. 137. *Ellison v. Elwin*, 13 Sim. 309. *Le Vasseur v. Scrutton*, 14 Sim. 116. *Borton v. Borton*, 16 Sim. 552. And these decisions have been followed by a similar one of Knight Bruce, Y. C.: *Ashby v. Ashby*, 1 Coll. 553. See also *Michelmores v. Mudge*, 2 Giff. 183.

Prole v. Soady, L. R. 3 Ch. 220. Where a married woman, who was entitled to a trust-fund in reversion, after a life-interest, had had the life-interest assigned to her, so that she had acquired the whole absolute interest, Shadwell, V. C., ordered the fund to be transferred to her husband, she consenting. *Hall v. Hugonin*, 14 Sim. 595. *Creed v. Perry*, *ibid.* 592. But these cases were deliberately overruled by Lord Cottenham in *Whittle v. Henning*, 2 Phill. C. C. 731. Where a married woman, to whom a rent-charge for life in reversion was devised to her *separate use*, without the intervention of trustees, joined with her husband in assigning it for a valuable consideration; it was held that she was bound by the assignment after the death of her husband: *Major v. Lansley*, 2 Russ. & M. 355: *Secus*, where the interest of the wife depends on the contingency of her surviving her husband: *Batt v. Cuthbertson*, 4 Dru. & War. 302, *coram* Sugden, C. of Ireland. See stat. 20 & 21 Vict. c. 57, enabling married women to dispose of reversionary interests in personal estate. As to the assignment by the husband and wife of a legacy to her, see *Best v. Argles*, 2 Crompt. & Mees. 394. As to the effect of an agreement to assign, see *Harwood v. Fisher*, 1 Y. & Coll. 110. As to the effect of the bankruptcy of the husband on his wife's *choses in action*, see *Pierce v. Thornely*, 2 Sim. 167.

marked, that a mere action into possession

Soady, L. R. 3 Ch. 220. married woman, who tiled to a trust-fund in, after a life-interest, had life-interest assigned to at she had acquired the absolute interest. Shad-C., ordered the fund to be ed to her husband, she g. Hall v. Hugonin, 14 p. Creed v. Perry, *ibid.* t these cases were deliber- rruled by Lord Cotten- Whittle v. Henning, 2 C. 731. Where a mar- man, to whom a rent- or life in reversion was o her separate use, without vention of trustees, joined husband in assigning it luable consideration; it that she was bound by nment after the death of and: Major v. Lansley, 2 M. 355: *Secus*, where the of the wife depends on the cy of her surviving her : Batt v. Cuthbertson, 4 Var. 392, *coram* Sugden. land. See stat. 20 & 21 57, enabling married o dispose of reversionary in personal estate. As signment by the husband of a legacy to her, see rgles, 2 Crompt. & Mees. to the effect of an agree- assign, see Harwood v. Y. & Coll. 110. As to of the bankruptcy of the on his wife's *chooses* in e Pierce v. Thornely, 2

will be insufficient to defeat her right to them by survivorship. The acts to effect that purpose must be such as to change the property in them, or, in other words, must be something to divest the wife's right, and to make that of the husband absolute, such as a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied to his use (r).

Accordingly in the case of *Scarpellini v. Acheson* (s), where, in an action of assumpsit on a promissory note by payee against maker, the defendant pleaded that, when the note was made, the plaintiff was the wife of B., and that, after the making, and while she was his wife, he elected to have and take the said note in his marital right, and then cause the plaintiff to endorse, and she, by his authority, did then endorse the note to B., and B. then delivered it so endorsed to F.; that afterwards, and after the note was due, and before action brought, B. died: and that afterwards and before action brought, the note came to the plaintiff's possession by delivery from F.; it was held, on special demurrer, that the plea was bad, because it did not clearly show such a reduction of the note into possession by the husband as disentitled the wife to sue upon it after his death.

So where a husband agreed that a legacy given to his wife should be set off against a sum of the same amount which he owed to the testator on his promissory note; and he and his wife signed a receipt for the legacy, but the executors did not deliver up the note to him; it was held, that she surviving him was entitled to be paid the legacy (t).

Again, a mere appropriation of the fund will be insufficient. Thus it was held, that a legacy to a married woman was not sufficiently reduced into possession, so as to

mere appropriation of the fund insufficient:

(r) 1 Roper, *Husb. & Wife*, 208, 369.

2nd edition. See also *Aitchison*

(s) 7 Q. B. 864.

v. Dixon, L. R. 10 Eq. 589.

(t) *Harrison v. Andrews*, 13 Sim.

Scrutton v. Pattillo, L. R. 19 Eq.

595.

prevent her right by survivorship upon her husband's death, by the appropriation by the executrix of a mortgage to the same amount (u).

receipt by the
husband :

It is clear, that if the husband receive the money, legacy, or duty which was owing to his wife, or if he alone, or he and his wife authorise a person to receive it who actually obtains it, either of those receipts will change the wife's interest in the property, and be a reduction of the *chose in action* into the possession of her husband, divested of her title to it upon surviving him : and his executors may maintain an action for the money so received by the person so authorized (x).

Thus in *Dodswell v. Earle* (y), A. the wife of B. was entitled to 250*l.*, under the Will of C., expectant upon the death of D. : The executor of C., upon B.'s application, and with the wife's consent, paid the money to B., he undertaking to pay to D. the interest during her life : The wife, having survived D., who survived her husband, claimed by bill in equity the 250*l.* against her husband's executors ; but the bill was dismissed (z).

Accordingly it has been held, that the husband may sufficiently reduce a mortgage debt due to the wife into possession by receiving the mortgage money, notwithstanding

(u) *Blount v. Bestland*, 5 Ves. 515.

(x) 1 Roper, Husb. & Wife, 220, 2nd edition. See *ante*, p. 742. Where money of a wife was, by the direction of her husband, who had the control of it, paid to the trustees of a post-nuptial settlement, which was not binding on the wife, it was held that her right by survivorship was destroyed, the property, having by these means been reduced into possession : *Hamilton v. Mills*, 29 Beav. 193. This case does not conflict with *Pringle v. Pringle*, 22 Beav. 631,

where the money was under the control of the Court of Chancery, which, without any direction or release or receipt from the husband, ordered the money to be paid to the trustee of a settlement approved of by the Court ; and it was held that the money, though held by the trustees, to some extent, for the husband, could not be considered as reduced into possession beyond the interest given him by the settlement.

(y) 12 Ves. 473.

(z) But see the cases, *ante*, p. 743, note (g).

her husband's death,
of a mortgage to the
the money, legacy,
or if he alone, or he
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the wife of B. was
expectant upon the
B.'s application, and
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her life: The wife,
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es. 473.
see the cases, *ante*, p.
7).

he dies before the mortgage estate has been re-conveyed;
and in such case the surviving wife will be a trustee of the
legal estate for the mortgagor (*a*). Again, if the husband
releases an annuity secured to the wife by bond, this will
bind her; for as he could release the bond, so he may the
annuity (*b*).

It may be useful in this place to adduce some authorities,
as to what acts do not amount to a receipt by the husband
or his apointee, so as to defeat the wife's title upon
surviving him.

what does not
amount to a
receipt by the
husband:

A transfer of the wife's stock into the husband's own
name will, it should seem, amount to such a receipt; because
it is an act vesting the whole property in him (*c*): But a
transfer of stock into the wife's name, to which she became
entitled during coverture, shall not be considered as a pay-
ment or transfer to the husband, so as to defeat her right
by survivorship (*d*).

In *Ryland v. Smith* (*e*), a married woman being entitled
under a Will to stock and to cash, forming part of a residue,
the husband wrote to one of the executors, requesting that
the stock should be transferred into the names of certain
trustees for the wife's separate use, and that the cash should
be paid to himself: These requests were complied with:
The husband employed part of the cash in increasing the
amount of the stock: He afterwards became bankrupt, and
died: It was held by Sir C. Perys, M.R., that the stock
transferred by the executors was not reduced into possession
by the husband, and therefore belonged to the wife by sur-
vivorship; but that the assignees under the bankruptcy were
entitled to the increase made by the husband.

On the other hand, in *Burnham v. Bennett* (*f*), by a post-
nuptial settlement, reciting that a sum of stock, originally
standing in the name of the wife, had been transferred into

(a) *Rees v. Keith*, 11 Sim. 388.

(b) *Hore v. Becher*, 12 Sim. 465.

(c) 1 Roper, *Husb. & Wife*, 221,
2nd edition.

(d) *Wildman v. Wildman*, 9 Ves.
174.

(e) 1 Mylne & Cra. 53.

(f) 2 Coll. 254.

the names of trustees, and that it had been agreed that a promissory note of 500*l.*, given to the wife by her brother, should be cancelled, and that he should give his bond to the trustees for the amount, it was witnessed, agreed and declared that the trustees should stand possessed of these funds, in trust to pay the interest and dividends to the husband for life; then to the wife for life; and, upon the death of the survivor, to transfer the funds to the children of the marriage; and, in case there should be no children, then to such persons as the wife should by deed or Will, during and notwithstanding her coverture, appoint, and in default of such appointment, to the husband, his executors, administrators, and assigns: There were no children of the marriage. The wife survived the husband: And it was held by Knight-Bruce, V.-C., that in the event of the death of the wife without making a valid appointment, the fund would belong to the husband's personal representative, as having been reduced into the husband's possession by the settlement. His Honour agreed, that in the case of a wife having a *chose in action*, whether legal or equitable, the mere circumstance of the legal title being changed does not, in general, affect her; but considered, in the present case, that the whole of the circumstances formed one entire transaction, as binding and effectual as if the husband had received the money or stock himself: and the learned Judge said, that he agreed with the substantial result of *Ryland v. Smith* (g), and *Wall v. Tomlinson* (h); for, as he understood them, the property had been made to change hands, with a view to an intended settlement; in each case the change was such, the circumstances were such, that if the settlement were treated as effectual the wife was entitled; but if the settlement were not effectual, then there was no trust, and nothing but the legal title changed; and, therefore in that view, the wife was entitled.

Again, in *Hansen v. Miller* (i), a married woman, an infant, having become entitled to 900*l.* under the trusts of her

(g) See *supra*, p. 747.

(h) 16 Ves. 413.

(i) 14 Sim. 22.

[Pt. II. Bk. III.]
 Ch. I. § III.] *Choses in Action of Wife.*

mother's settlement, the trustees paid 400*l.*, part of it, to her husband, upon the understanding that he should settle the remaining 500*l.* for the benefit of his wife in the manner after mentioned : Accordingly the trustees paid the 500*l.* to M. and N., the husband's nominees ; and, by a deed made between the husband and wife and M. and N., it was declared that M. and N. should pay the income of the 500*l.* to the wife, for her separate use for life, and that after her death, the principal should remain upon such trusts as she should appoint by Will, and in default of appointment, in trust for her next of kin, according to the Statutes of Distribution : The wife survived her husband : And it was held by Shadwell, V.-C., that the settlement was binding on her ; and that, under it, she was entitled merely to the income of the 500*l.* for life, and not to the principal absolutely.

Where a *feme sole* was entitled to a sum of money charged on her brother's estate, who, in a settlement made on the occasion of her marriage, covenanted to pay it to her husband, and the husband received the interest, but died without having got in the principal, it was held to vest in the wife by survivorship (*k*). In the case of *Nash v. Nash* (*l*), the receipt by the husband of part of the principal on the promissory note made to the wife, and of the interest upon the remainder, was held by Sir Thomas Plumer, V.-C., to be no reduction into possession of such remainder, so as to bar the wife's right by survivorship (*m*). So also where money was left in the hands of trustees for the benefit of the wife, and her husband died, she was declared to be entitled to it by survivorship, her husband having made no disposition of it during his life (*n*).

In *Shuttleworth v. Greaves* (*o*), the wife of F. Shuttleworth was the only child of a person who was entitled to certain shares in the Nottingham Canal, which, upon that person's

(*k*) *Howman v. Corie*, 2 Vern. 6 Q. B. 937. *Accord.*

190.

(*n*) *Twisden v. Wise*, 1 Vern.

(*l*) 2 Madd. 133.

161.

(*m*) See also *Hart v. Stephens*,

(*o*) 4 Mylne & Cr. 35.

death, were transferred into the names of "F. Shuttleworth and wife," the wife having been her father's administratrix. F. Shuttleworth was ever afterwards, until his death, treated by the Canal Company as the proprietor of the shares, and received the dividends upon them, and was elected to be and acted as a member of a committee, which, by the canal Act was required to consist of proprietors of two or more shares. Lord Cottenham said that it was not necessary to express any opinion on the point, whether the transfer of the shares into the names of the husband and wife was a reduction into possession by the husband; because if such transfer did amount to a reduction into possession, so as to defeat the title of the wife surviving, a new estate was thereby created under which she, as survivor of the two, would be entitled (p).

husband's
receipt as
trustee :

The husband's receipt or possession of his wife's *choses in action* must be in the character of husband in order to defeat his wife's title by survivorship. Thus, in a case (q) where a trustee and executor married one of the residuary legatees named in the Will, it was determined that his possession of the testator's personal estate was to be considered as that of trustee and executor, he having alone proved: so that his wife's share of the residue could not be regarded as sufficiently reduced into possession to prevent its surviving to her upon his death (r).

effect of
proceedings in
law and equity
on the wife's
choses in
action :

if the wife be
joined in an
action, the
judgment may
survive : *secus*,
if the husband
sue alone :

It remains to consider the effect of proceedings at Law and in Equity, and submissions to arbitration, as to vesting absolutely in the husband the wife's *choses in action*.

The naming or not naming the wife in an action is attended with material consequences in relation to the present subject; for if she be a party, and the husband die after judgment, and before execution sued out, the judgment will survive to her, and she will be entitled to proceed

(p) See also *Low v. Carter*, 1 Beav. 426, and *ante*, p. 669, as to the effect of an investment in stock by the husband in the joint names

of himself and wife.

(q) *Baker v. Hall*, 12 Ves. 497.

(r) See also *Wall v. Tomlinson* 16 Ves. 413.

of "F. Shuttleworth
her's administratrix
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f his wife's choses in
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and wife.
ter v. Hall, 12 Ves. 497.
also Wall v. Tomlinson
13.

on such judgment (s). But if the action be brought by
the husband alone, and he die after judgment, his represen-
tives, and not the wife, will be entitled to the benefit of
(t). Costs ordered by rule of Court to be paid to the
husband and wife have been held to survive to the wife (u).

If the husband alone prove the wife's debt under a
commission of bankrupt against the debtor, it seems that
her right by survivorship is not defeated (x).

Decrees in equity so far resemble judgments at law in
this respect, that until the money be ordered to be paid, or
declared to belong to the husband, the wife's rights will
remain undisturbed; and as a joint judgment will survive to
the wife if her husband die before execution is awarded, so
will a joint decree until an order be obtained for payment,
declaring the money to belong to the husband (y). An
order for a payment of a sum of money to the husband, in
right of his wife, changes the property, and vests it in him
from his wife's right by survivorship (z).

In another case the husband having assigned a fund in
Court belonging to the wife, an order was made, on her
examination and consent, that part of it should be paid to
the assignee, and that the interest of the remainder should
be paid to her for her life for her separate use, with liberty
for any persons entitled to apply at her death: This was
held not to affect her right of survivorship, as to the

effect of proof
under com-
mission of
bankrupt:

decrees and
orders in
equity:

(t) As to the cases in which the
husband and wife must join, and
those in which he may sue alone,
see join with the wife, at his option,
see Com. Dig. Baron and Feme
(t) (x).

(y) Russell's case, Noy, 70. Gar-
field v. Bradley, 2 Ves. Sen. 676,
677, in Lord Hardwicke's judg-
ment. 1 Roper, Husb. & Wife,
113, 2nd edit.

(z) Tilt v. Bartlett, Hanmer,
104.

(z) See also Anon. 2 Vern. 707

(y) Murray v. Lord Elibank, 10
Ves. 91. 1 Roper, Husb. & Wife,
216, 217, 2nd edit. See also Adams
v. Lavender, 1 M'Clel. & Y. 41.
Hore v. Woulfe, 2 Ball & B. 424.
Nanny v. Martin, 1 Eq. Cas. Abr.
68. Phipps v. Anglesea, 22 Nov.
1738, MS. Bond v. Simmons, 3
Atk. 20. Macaulay v. Philips, 4
Ves. 15. Baldwin v. Baldwin, 5
De G. & Sm. 319.

(z) Heygate v. Annesley, 3 Bro.
C. C. 362.

remainder of the fund; and on her death, she having survived her husband, a transfer to her administrator was directed (a).

Effect of
arbitration on
the wife's
chores in
action:

There has already been occasion to observe, that an award in favour of the husband in regard to the wife's leasehold interest will alter the property, and vest the term in him (b); and it has been so decided in regard to her other chattels (c).

agreements
pendente lite:

However, a Court of Equity will not permit agreements entered into between a married woman, or her friends acting for her and her husband, *pendente lite*, to be obligatory upon her; so that any arrangement which, pending a suit, may be so made, by which it is agreed that he, upon certain terms, shall have the residue of her property, will not, without the sanction of the Court, bind her: Notwithstanding therefore, such an agreement, if the title of the husband's representatives rest solely upon it, his wife's right by survivorship will take place (d).

When executors are entitled to the wife's chores in action by reason of an antenuptial settlement.

The executors of the husband may be entitled to the exclusion of the widow to her *chores in action*, although not reduced by him into possession, by reason of an antenuptial settlement on the wife; for the husband may entitle himself to all his intended wife's personal estate, whether in possession or in action, or which she may afterwards acquire, by becoming a purchaser of it previously to and in contemplation of the marriage.

But a mere settlement will not entitle the husband or his executors to the whole of the wife's fortune. There must be an agreement for the purpose either expressed or implied for if the stipulation be for a part only of her property, that necessarily excludes the residue; or if the agreement extend

(a) *Johnson v. Johnson*, 1 Jac. & Walk. 472. 1 Roper, *Husb. & Wife*, 218, 2nd edition. See also *Re Jenkins*, 5 Russ. 183.

(b) *Ante*, p. 609.

(c) 1 Roper, *Husb. & Wife*, 219,

2nd edition. *Oglander v. Baston*, 1 Vern. 396.

(d) 1 Roper, *Husb. & Wife*, 218, 2nd edit. *Macaulay v. Phillips*, Ves. 15.

ath, she having sur-
r administrator was
serve, that an award
the wife's leasehold
the term in him (b).
er other chattels (c).
t permit agreements
a, or her friends act-
lite, to be obligatory
hich, pending a suit
that he, upon certain
property, will not, with
her: Notwithstanding
title of the husband's
wife's right by sur-
vivorship.

y be entitled to the
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son of an antenuptial
d may entitle him-
e, whether in posses-
afterwards acquire, b-
o and in contemplation
of the husband or his
fortune. There must
expressed or implied
y of her property, that
the agreement exten-

tion. *Oglander v. Baston*
396.
Roper, Husb. & Wife, 21
t. *Macaulay v. Phillips*.

the whole of the fortune she was then entitled to, her hus-
band or his executors will not be entitled to any personal
estate which may accrue to her during the marriage: And
it is presumed, that adequacy or inadequacy of the provision
is a consideration so indeterminate and capricious, that the
Court will not take that circumstance into consideration,
when nothing appears from the settlement of any agreement
or contract that the husband should, in consideration of it,
be the purchaser of, or entitled to the whole of his wife's pro-
perty, or what she may in future become entitled to during
the marriage (e).

In *Druce v. Denison* (f), Lord Eldon said, that, accord-
ing to the modern cases, it is established, that the settlement,
to be the purchase of the wife's fortune, must either express
to be for that consideration, or the contents of the settle-
ment altogether must import that, and plainly import it as
much as if it were expressed: that such was the result of the
cases upon the subject, and that it was not worth while to
consider in what respect the older cases were unsatisfactory,
involving inquiries not very easy to execute.

The other principal decisions on this subject will be found
collected in the note below (g): And the deductions drawn
from them by an able modern writer (h) are as follows:—
1. That a settlement, made before marriage in consideration
of the wife's fortune, without saying more, entitles the
husband to all her then personal property, and not to such
which afterwards accrues to her. 2. That if a part of her
fortune only appear to be stipulated for, the residue she
then has, or what may afterwards accrue to her, will not

(g) 1 *Roper, Husb. & Wife*, 298,
2d edit.

(f) 6 *Ves.* 365.

(g) *Heaton v. Hassell*, 4 *Vin.*
44, p. 40, tit. *Baron and Feme*,

(h) pl. 11, in *margine*. *Adams*
18, *Cole*, *Cas. temp. Talb.* 168.

Cloland v. Cloland, *Prec. Chanc.*
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63. *Garforth v. Bradley*, 2 *Ves.*
Sen. 675. *Burdon v. Dean*, 2 *Ves.*
Jun. 607. *Elibank v. Montolieu*,
5 *Ves.* 737. *Mitford v. Mitford*,
9 *Ves.* 87. *Carr v. Taylor*, 10 *Ves.*
574.

(h) 1 *Roper, Husb. & Wife*, 298,
2d edit.

belong to the husband. 8. But when it appears from the settlement, that it was the agreement between the parties that he should not only have his wife's then present, but all her subsequently acquired personal estate, he will in such cases be entitled to the whole under the marriage contract. And 4. That in instances where any of the wife's *choses in action* are not purchased by the husband by settlement, they will be subject to her rights of survivorship, which have been before considered.

Executors of husband not entitled to wife's *choses in action* by reason of a postnuptial settlement.

It has just been stated, that an actual agreement or contract is necessary to give to the husband's executors his wife's *choses in action*, in the event of her surviving him, in consideration of the provision made by him for her: and it seems a necessary consequence, that a settlement made after the marriage by the husband upon his wife, even upon an accession of fortune to her (not given to her separate use and disposition) will not constitute the husband a purchaser of such additional fortune, but the wife's title by survivorship will prevail; because as a *feme covert* she was incapable of contract, and especially of contract with her husband (i).

And it should seem, that the sanction of the wife's father, guardian or trustee, could not give any additional effect to such a settlement, as against her, in the event of her surviving (k).

2. Rights of administrator of wife to her *choses in action*, when her husband survives.

2. It remains to consider, secondly, the rights of the administrator of the wife to her *choses in action*, when the husband survives. If the husband takes out letters of administration to her, (to which, as it has already appeared (l) he has exclusively the right,) he will be entitled, as such administrator, to all her personal estate which continued in action or unrecovered at her death. Therefore, where it was stipulated in marriage articles, that money in the funds, the

(i) 1 Roper, Husb. & Wife, 303, 2nd edit. *Lanoy v. Athol*, 2 Atk. 448. See *Sykes v. Meynal*, 1 Dick.

(k) *Stamper v. Barker*, 5 Mad. 157.

(l) *Ante*, pp. 346, 347. 368 *contra*.

Ch. I. § III.] *Choses in Action of Wife.*

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property of the intended wife, *should be for her sole and separate use*, as if she were sole and unmarried, and the marriage took effect, and the wife died in the husband's lifetime without issue, and without having made any appointment of her separate property; it was held by Sir John Leach, M. R., that the husband was entitled to it, as her administrator, and not her next of kin (m).

If the husband should die before he has obtained a grant of the administration, or after having taken out letters, before all her property in action has been reduced into possession, such property cannot be recovered by his representatives: but administration must be taken out to the wife for that purpose, either generally, or *de bonis non*, as the case may require (n): Such administrator, however, will be considered, in equity, as a trustee of what he receives for the personal representatives of the husband (o).

Where there was a fund in the Court of Chancery, standing to the separate account of a married woman, whose husband survived her, and died before administering to her estate, it was held by Lord Brougham (reversing the decision of Sir John Leach), that the fund ought to be paid out to the wife's legal personal representative, without also taking out administration to the estate of the husband (p).

(m) *Proudley v. Fielder*, 2 M. & K. 57. But where a husband and wife lived separate from each other, and at her death she was possessed of cash and bank-notes, arisen from property settled to her separate use, it was held by Sir L. Shadwell, V.-C., that the husband was entitled to them in his marital right; for that as she had not disposed of them, as she might have done, by deed or Will, the quality of separate property ceased at her death, and her husband was entitled *jure mariti* and need not become her administrator in order to entitle himself: *Molony v. Ken-*

nedy, 10 Sim. 254. See also *Bird v. Peagram*, 13 C. B. 650.

(n) *Betts v. Kimpton*, 2 B. & Adol. 273. *Att.-Gen. v. Partington*, 3 Hurlst. & C. 193, *ante*, p. 351. In the goods of *Harding*, L. R. 2 P. & D. 394.

(o) *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381. *Humphrey v. Bullen*, 1 Atk. 458. S. C. 11 Vin. Abr. 86. *Elliott v. Collier*, 3 Atk. 526. See *ante*, pp. 349, 350, as to the person entitled to the grant of such an administration.

(p) *Gutteridge v. Stilwell*, 1 M. & K. 486. *Ante*, p. 351. How-

It is obvious, that in all the instances above stated, where the wife's right by survivorship, in case of her outliving her husband, would be barred by his having reduced her *chose in action* into possession in his lifetime, there, in the event of his surviving her, he may bring an action respecting such *chose in action* in his individual character, and must not sue as the administrator of his wife.

Thus where on a bond to the wife, *dum sola*, the husband gives a letter to another to receive the money, who receives it, and then the wife dies, the husband shall bring an action to recover it from the receiver, individually, and not as his wife's administrator (*q*). So where a legacy was left to a *feme sole*, who afterwards married, and then the husband and wife gave a letter of attorney to another to receive the money, who received it, and afterwards the wife died, and then the husband died; it was held that the action was well brought by the husband's administrator: because the receipt changed the property to the husband alone (*r*).

If the wife be a mortgagee in fee, the husband surviving her will be entitled to the mortgage, as her administrator, and the heir will be a trustee for him. This was admitted in *Turner v. Crane* (*s*), where, however, the heir was held

never, in *Loy v. Duckett*, 1 Cr. & Ph. 312, Lord Cottenham said that Sir J. Leach's view was more correct than Lord Brougham's; because it would follow from Lord Brougham's, that even where an executor had assented to a legacy, he might still sue for the fund, out of which the legacy was to be paid, on the strength of his legal title, without making the legatee a party; which would, in fact, be administering the fund in the absence of the owner. See also *Pennington v. Buckley*, 6 Hare, 459, by Wigram, V.-C. Att.-Gen. *v.* Partington, 3 Hurlst. & C. 206,

L. R. 4 H. L. 100. *Ante*, p. 351.

(*q*) *Huntley v. Griffith*, Moore 452. So, Fry, J., following this case, held the receipt by an agent appointed by the husband and wife of money forming part of the estate of an intestate, of which the wife was administratrix, amounted to a reduction into possession by the husband of the wife's distributive share of the money: *Ex parte Barber*, 11 C. D. 442. See also *Fleet v. Perrins*, L. R. 4 Q. B. 506.

(*r*) *Ibid.*

(*s*) 1 Vern. 170. 1 Roper, Husband & Wife, 205, 2nd edit.

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entitled, on the ground that there was no covenant for pay-
ment, a distinction which does not now prevail (t).

In a case where the wife and her second husband de-
vised lands, which she held in dower from her first husband,
for a term of years, reserving a rent; the rent became in
arrears, and the wife died; her second husband was held
entitled to the arrears, and not the heir of the first husband,
who could not claim them, since he was a stranger to the
lease (u).

It must be observed, that, at common law, if a *feme sole*
was seised of a rent service, charge, or seck, in fee, fee tail,
or for life, which was behind and unpaid; and she took
husband, and the rent was behind again, and then the wife
died; the husband should not have the arrears grown due
before the marriage, but for those become due during the
coverture, the husband might have had an action of debt (x).
But by the statute 32 Hen. VIII. c. 37, s. 3, if the husband
survive the wife, he shall have the arrears incurred, as well
before the marriage, as after (y).

So if a husband be seised of an advowson in right of
his wife, and the church become void during the coverture,
the wife shall have *quare impedit*, if she survive him, and
the husband, if he survive her (z); even though he, by
reason of her having had no issue, be not tenant by the
curtesy (a): but if the church fell void before the cover-
ture, the husband cannot bring a *quare impedit* if he survive
her (b).

In these cases, when it is said, that the husband cannot
at common law recover the arrears of rent due before the
marriage, and that he cannot now have a *quare impedit* for
a presentation which fell vacant before coverture, it must

(t) See *ante*, p. 602.

the wife: Anon. Owen, 3.

(u) 2 Bro. 204, b. tit. Rents, pl.

(y) Co. Lit. 351, b.

(v) 1 Roper, Husb. & Wife, 206,
2nd edit.

(z) Co. Lit. 351, b.

(x) Co. Lit. 162, b. 351, b. So
for the arrears of an annuity to

(a) Wats. C. L. 71, 72.

(b) Co. Lit. 351, b.

be understood (it is submitted), that he cannot claim them as a marital right in his individual character: because it seems clear, that, as her administrator, he might at common law have recovered the rent (as soon as the estate of freehold was determined), in the former case, and may now maintain a *quare impedit* in the latter. The reason given by Lord Coke against the right of the husband, is, that the arrears of rent and the void church were merely in action before the marriage (c): Hence it should follow, that, like all other *choses in action* not reduced into possession, though they do not belong to the surviving husband *jure mariti*, they will go to him as his wife's administrator (d).

If, previously to the marriage, the wife obtained a judgment and then she and her husband sue out a *scire facias* and have an award of execution, but, before execution, the wife dies; the husband shall not proceed as her administrator, but may sue out a new *scire facias* by survivorship in his individual character (e). So in the case of *Forbes v. Phipps* (f), there was a decree of a Court of Equity, that one-sixth share of a residue, to which the wife was entitled, should be paid to her and her husband: The wife died before the money was received, and her husband being the survivor, it was determined that he should take the money under the decree by survivorship, and not as his wife's administrator, so as to render the fund liable in his hands to her debts.

Husband not entitled where wife died joint-tenant of a reversionary chose in action.

A singular case arose as to the husband's rights, as survivor, to his wife's reversionary *choses in action*. A woman who was entitled to a pecuniary legacy, as one of several joint-tenants in reversion after the death of a tenant for life of the fund, married, and then predeceased the tenant for life: The question was, whether, on the death of

(c) Co. Lit. 351, b.

(d) Att.-Gen. v. Partington, 3 Hurlst. & C. 205. Accord.

(e) Woodyer v. Gresham, 1 Salk. 116. See *post*, Pt. II. Bk. III. Ch.

iv. as to proceedings in lieu of *scire facias*.

(f) 1 Eden, Rep. 502. See also Hore v. Woulfe, 2 Ball & Beat. 424.

the tenant for life, the wife's share should go to the surviving joint-tenants or to her husband: and Turner, V.-C., decided in favour of the joint-tenants: His Honour held that, as the wife's interest was reversionary, the title of the husband could not arise till after her death in his lifetime; and that the case, therefore, did not fall within the principle of the rule as to chattels personal, but within that as to chattels real; and according to the latter rule (*g*), as the property did not vest in the husband, the joint-tenancy was not severed by the marriage, but continued till the death of his wife; and then the elder title of the other joint-tenants by survivorship prevailed (*h*).

(*g*) See *ante*, p. 612, note (*u*).

(*h*) In the *Trusts of Barton's Will*, 10 Hare, 12. *Armstrong v. Armstrong*, L. R. 7 Eq. 518. And the same would be the case though the *choses in action* were not rever-

sionary if it had not been reduced into possession by the husband. See *Re Butler*, 38 C. D. 286, disapproving *Baillie v. Treharne*, 17 C. D. 388.

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CHAPTER THE SECOND.

TO WHAT CHOOSES IN ACTION THE EXECUTOR OR ADMINISTRATOR
IS ENTITLED, WHERE THE ACTION ACCRUES AFTER THE DEATH
OF THE TESTATOR OR INTESTATE.

IT is now proposed to consider in what cases an executor or administrator may sue, where the cause of action accrues after the decease of the testator or intestate.

Actions for
torts done in
the executor's
time.

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the tort. And, under such circumstances, he has his option, either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character.

This right of action, and option as to the form in which it shall be brought, exists in the executor or administrator, whether he has ever had actual possession of the property or not. Mr. Justice Buller, indeed, in *Cockerill v. Kynaston* (a), laid down, that if the goods, which were the subject of the action, were never in the actual possession of the executor or administrator, it is absolutely necessary for him to declare in that character: But that opinion has been since frequently overruled (b): For it is a rule of law, that the *property* of personal chattels draws to it the *possession*, so that the owner may bring either trespass or trover at his election against any stranger who takes them away (c): Now on the death of the testator or intestate, his executors or administrators are, in point of law, the owners of the goods which belonged to him; and consequently whether in actual possession of them, or not, before the tort committed,

(a) 4 T. R. 277, 281.

(b) *Bollard v. Spencer*, 7 T. R. 358. *Hollis v. Smith*, 10 East, 294.

Grimstead v. Shirley, 2 Taunt. 117.

(c) *Bro. Trespass*, 303. *Hudson v. Hudson*, Latch. 214.

they may declare, as any other person may, upon their own property, when wrongfully damaged by another (*d*).

Therefore executors or administrators may maintain trespass for taking away the goods of the testator or intestate after his death, either in their own name, or in their representative character, whether they were ever actually possessed of them or not (*e*). And if they sue as executors or administrators, they may either declare that the deceased was possessed of the goods and the trespass committed after his death to the damage of the executors or administrators (*f*); or as the property in the goods draws to it the possession in law, they may declare on their own possession as executors (*g*). So with respect to the action of trover, if the goods of the testator are taken and converted after his death, and before the executor has obtained possession of them, he may either bring an action in his own name, without alleging himself executor (*h*), or he may sue as executor, and declare either that the testator was possessed of the goods and the defendant after his death converted them (*i*), or he may allege that he himself was possessed as executor, and the defendant converted them (*k*).

(*d*) *Hollis v. Smith*, 10 East, 351.

(*e*) *Adams v. Cheverel*, Cro. Jac. 113.

(*f*) Cro. Jac. 113.

(*g*) 2 Saund. 47 n., note to Wilbraham v. Snow.

(*h*) *Hole v. King*, Com. Rep. 100. *Jenkins v. Flombe*, 6 Mod. 151.

(*i*) *Hudson v. Hudson*, Latch. 214.

(*k*) *Anon.* Comberb. 451. 2 Saund. 47 n., note to Wilbraham v. Snow.

Thus, in *Fraser v. The Panama Canal Company*, 1 Adol. & Ell. 354, the mortgagee of the

lease of a colliery, together with the machinery and barges be-

longing thereto, died before the day of redemption: After his death, the mortgagor, who had remained in possession, made default in the payment of the mortgage debt, but was not dispossessed by the administrator of the mortgagee: The mortgagor subsequently demised the mortgaged property to a third party, who took possession under such demise, and put his name on the barges: During such possession, the barges, together with a quantity of coal, the produce of the colliery, were illegally seized by the defendants for tolls due from the mortgagor's lessee: And it was held, that the plaintiff, as administrator, had sufficient

COND.

OR ADMINISTRATOR
UES AFTER THE DEATH

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It has already appeared that an executor or administrator may maintain these actions, although the injury was done before probate or administration granted (l).

An executor, as such, may maintain *quare impedit*, for a disturbance in his own time (m), or ejectment, where the testator had a lease for years, or from year to year, upon an ouster after his death (n).

Actions on
contracts
made with the
executor.

So with respect to matters of contract, it has been decided, in a variety of modern cases, that an executor or administrator may sue *as such*, as well as in his own name upon a contract made with him in his representative character: And this he may do, not only in cases where the consideration flows from the deceased, but also in cases where the consideration flows directly from himself as executor. Thus an executor may declare, as such, in *assumpsit* not only on an account stated with him as executor concerning money due to the testator from the defendant, but also on an account stated with him as executor, concerning money due to him as executor (o). Again, an executor may maintain an action, as such, for money lent by him as executor (p). So where money belonging to the estate of the testator is received after his death, the executor may declare, on the implied *assumpsit*, for money had and received to his use as executor (q). So in *Ord v. Fenwick* (r), it was held that an administratrix, as such, may maintain *assumpsit*, for money paid by her as administratrix to the use of the defendant. And Lord Ellenborough laid down, that if an executor

property in the coal raised from the mines after he took out administration, and in the barges marked with the name of the mortgagor's lessee, to maintain trover.

(l) *Ante*, pp. 552, 553.

(m) *Smallwood v. Bishop of Coventry*, Cro. Eliz. 207.

(n) *Slade's case*, 4 Co. 95, a.

Moreton's case, 1 Vent. 30. *D. v. Porter*, 3 T. R. 13.

(o) *Needham v. Croke*, 1 Freeman 538. *Thompson v. Stent*, 1 Taunt. 322.

(p) *Webster v. Spencer*, 3 B. A. 365.

(q) *Foxwist v. Tremaine*, Saund. 208.

(r) 3 East. 103.

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Webster v. Spencer, 3 B.
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Foxwist v. Tremaine,
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3 East, 103.

ued on the obligation of the testator, who had become
surety for a joint obligor, and is thus compelled to pay, an
action will lie by the executor, as such, to recover the money
so paid (s). So in *Clarke v. Hougham* (t), it was held, that
where an administrator, in his representative character, has
paid that which he ought not, he may in the same character
recover it back again. Again, in *Cowell v. Watts* (u), it was
decided that an action may be maintained by an adminis-
tratrix, as such, for goods sold and delivered by her as
administratrix after the death of the intestate. So in the
case of *Marshall v. Broadhurst* (x), where the testator had
agreed to do certain work, and died before the work was
begun, and the executors did the work, using the materials
of the testator, and then brought an action, declaring in
their representative character for work and labour done,
materials found, and goods sold and delivered by the plaintiffs
as executors; it was holden by the Court of Exchequer, that
they might recover the value of the materials; and the
Court seemed to be further of opinion, that they might
recover also for the work and labour as executors. And in
Edwards v. Grace (y), it was afterwards expressly decided in
the same Court, that an executor might sue, as such, for
work done by him as executor. So in the case of *Aspinall*
and others v. *Wake* (z), where the plaintiffs, being executors,
had continued to work the leasehold quarries of their testator,
and had shipped off for the defendant, from time to time,
cargoes of stone, partly dug before, and partly after the
testator's death, and the defendant had accepted bills, for
the price of some of the cargoes, drawn by the plaintiffs as
executors; it was held that they might well sue, as executors,
for the price of the remainder of the cargoes. And, lastly,
in the case of *Werner v. Humphreys* (a), where a coat had
been ordered by the defendant of a tailor, and had been cut

(s) 3 East, 105, 106.

(t) 2 B. & C. 149.

(u) 6 East, 405.

(x) 1 Crompt. & Jerv. 403.

(y) 2 Mees. & W. 190.

(z) 10 Bingh. 51.

(a) 2 M. & Gr. 853. *Moseley v. Rendell*, L. R., 6 Q. B. 338.

out of the tailor's own cloth, tacked together and tried on in his lifetime, but was finished and delivered after his death by his administratrix; it was held that she could not sue for the price, as for goods sold and delivered by the intestate, but that the proper form of action was for goods sold and delivered by her as administratrix.

So with respect to negotiable instruments, it was decided in *King v. Thom* (b), that if a bill be indorsed to A. and B. as executors, they may declare as such, in an action against the acceptor. So in *Partridge v. Court* (c), it was held that an administrator may sue, as such, on a promissory note given to him as administrator since the death of the intestate. So where a bill of exchange was indorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: it was held, in *Catherwood v. Chabaud* (d), that the administrator *de bonis non* of J. C. might sue upon the bill, on the ground that, where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves on the administrator *de bonis non*.

The principle on which these cases was decided has not been settled without conflict. Several old cases may be found, in which it was considered that the contracts made with an executor or administrator were personal to him, and that he must sue for them in his own right, and not in his representative capacity: and, particularly, in the instance of negotiable instruments, it was conceived, until very modern times, that if an executor took a bill or note from a debtor to the estate of his testator, a new debt was thereby created, which must be declared on as such. However, the rule may now be regarded as firmly established by the later cases, that wherever the money recovered will be assets, the

(b) 1 Tr. R. 487, recognized by Tyndall, C.J., in *Aspinall v. Wake*, 10 Bingham. 55.

(c) 5 Price, 412, confirmed in error, 7 Price, 591.

(d) 1 B. & C. 150.

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executor may sue for it, and declare in his representative
 character (e).

In the case of several executors, although it is established
 by these authorities, that the circumstance of the money to
 be recovered on a contract being assets warrants them in
 suing for it in their representative character; yet it is not
 established that in all cases where the money recovered would
 be assets, *all* the executors may join in suing on a contract,
 whether they *all* made the contract or not. Thus in *Heath*
v. Chilton (f), where two or three executors (who had alone
 proved the Will) authorized an attorney to receive rents
 due to the estate of the testator, and to give receipts in
 their names, and the rents were received, and receipts given
 accordingly; it was held, that the *three* executors could not
 jointly sue the attorney for the money, unless it were found
 by the jury, that the two contracted with him on account
 of themselves and the other co-executor, or generally on
 account of the estate, with a view to the interference of the
 co-executor, in case he should choose to take a part in the
 management of it.

It must be further observed, that if the executor or ad-
 ministrator takes a *bond* from a simple contract debtor to the
 estate of the deceased, though it be given to him *as executor*
 or administrator, it should seem that he cannot sue in his
 representative capacity on such bond; because the effect of
 the bond is to extinguish the simple contract debt, creating a
 new and personal obligation of a higher nature (g).

Where an agent having property of his principal in his
 hands, and being ignorant of the death of his principal, for
 the purpose of transmitting the property, obtained a bill of

(e) *Cowell v. Watts*, 6 East,
 410, 411, 412. *Heath v. Chilton*,
 12 M. & W. 637, *per* Parke, B.
Abbott v. Parfitt, L. R. 6 Q. B.
 348, distinguishing *Bolingbroke v.*
Kerr, L. R. 1 Ex. 222, in which
 case the business was not carried
 on for the benefit of the estate.

As to set off in these cases, see
post, Pt. v. Bk. I. Ch. I. and II.

(f) 12 M. & W. 632.

(g) *Hosier v. Lord Arundell*, 3
 Bos. & Pull. 7. *Partridge v. Court*,
 5 Price, 419, 420, 421. *Price v.*
Moulton, 10 C. B. 561.

exchange for the value, and indorsed it specially to his principal; it was held, that as the property, for which the bill was remitted, belonged to the principal's estate, it was competent to his administrator to elect to take the bill as a mode of payment, that the property vested in him, and that he acquired a right to sue upon the bill in that character (*h*).

It was assumed by counsel, in arguing against the right of the executor to sue as such, in *Clarke v. Hougham* (*i*), that where a payment by an executor or administrator is a *devastavit*, the personal representative can only sue to recover it back in his own name: But Mr. Justice Bayley, in delivering his judgment, observed, "That is a principle to which I cannot assent: on the contrary, when he discovers that he has in his representative character paid that which he ought not, he may in the same character recover it again. The money was assets; and if the suit be as executor or administrator, it will continue assets; but if the suit be in the individual capacity, the demand will be in the first instance subject to a set-off, or when recovered will be liable to the plaintiff's debts. A *devastavit* is a wrong, and the law will not compel an executor to persevere in a wrong" (*k*).

An executor or administrator may bring an action on judgment recovered by him as executor or administrator and he may sue in this case either in his representative character, or in his own name (*l*).

(*h*) *Murray v. E. I. Company*, 5 B. & A. 204.

(*i*) 2 B. & C. 149. *Ante*, p. 763.

(*k*) 2 B. & C. 155. But in the case of *Munt, Executors, &c., v. Stokes*, the testator having borrowed money on a *respondentia* contract, prohibited by the laws of this country, his executors, the plaintiffs, refunded the money to the lenders, the defendants; the Court held, that the executors

could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not compel them to pay it; and Buller, J. said, that even if the plaintiffs were entitled to recover, they should have declared in their own right, and not as executors: T. R. 561.

(*l*) *Crawford v. Whittall*, Doug. 4, n. (1).

ed it specially to his property, for which the principal's estate, it was elect to take the bill property vested in him, upon the bill in that

ing against the right *Re v. Hougham* (i), that administrator is a *devas* only sue to recover *ice Bayley*, in delivering a principle to which *en he discovers that he* *aid that which he ought* *recover it again. The* *as executor or adminis* *the suit be in the indi* *in the first instance* *ed will be liable to the* *wrong, and the law will* *n a wrong" (k).*

y bring an action on *ecutor or administrator* *er in his representative*

not maintain an action *y had and received to recover* *this money, notwithstanding* *defendants could not compe* *to pay it; and Buller,* *that even if the plaintiff* *entitled to recover, the* *d have declared in their ow* *and not as executors:* *561.*

Crawford v. Whittall, Doug *(1).*

Claims by or against an executor or administrator as such, may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (m).

In the above cases of contract, the promise sued upon by the executor was expressly or impliedly made to himself in his representative character; but it is clear, that in many cases an action on which the deceased himself could not have sued, may accrue to the executor or administrator in his own time, upon a contract made with the testator or intestate in his lifetime.

It has already appeared, that where a cause of action accrued in the lifetime of the testator on a contract made to him, without naming his executors, or to him and his assigns, such *chose in action*, generally speaking, is transmitted to the executor (n): And the executor will also be entitled to sue on such a contract, although the action does not accrue till after the death of the testator. Thus, if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, if A. refuse to grant the lease, when the day arrives, to the executor of B., the executor shall have an action as much on the covenant (o). So in the case of *Husband v. Pollard* (p), a father possessed of a term for years, held of the church, and renewable every seven years, assigned this lease to his son in trust for himself for life, remainder in trust for the son, his executors, administrators, and assigns, and the father covenanted to renew the lease every seven years as long as he should live; the son died, and the seven years

Suits accruing in time of executor on contracts made with testator.

(m) Rules of the Supreme Court, 1863, Ord. XVIII., rule 5. This rule, it seems, does not apply to counterclaims. *Macdonald v. Carrington*, 4 C. P. D. 28.

(n) *Ante*, p. 697.

(o) *Chapman v. Dalton*, Plowd. 286. Wentw. Off. Ex. 188, 14th edit.

(p) Cited in *Randal v. Randal*, 2 P. Wms. 467.

passed, upon which the executors of the son brought a bill to compel the father to renew the lease at his own expense, and it was decreed accordingly.

on a contract
made with the
testator and
his assigns.

So if A. covenant to grant a lease to I. S. and *his assigns* by Christmas, and I. S. dies before that time, and before the grant of the lease, it must be made to his executors, as his assigns, or they may bring covenant (q). So if a contract to deliver a horse on a given day to B., or *his assigns*, if B. dies before the day limited for the delivery of the horse, his executor may maintain an action on the contract, if A. refuse to deliver the horse to him, because, by law, he is the assignee of B. for such a purpose, and represents his person as to receiving any chattels real or personal (r): although if A. in his lifetime had appointed I. S. to receive the horse I. S. would have been entitled as assignee in deed (s). So if a man be bound to deliver a true rental, &c., to I. N., or his assignee, at the end of twenty years, and he makes an executor, and dies before the end of twenty years, there the obligee is bound to deliver a true rental to the executor; for he is an assignee in law (t). So where one was bound to stand to the award of two arbitrators, who awarded that the party should pay unto a stranger, or his assigns, 200*l.* before such a day; the stranger before the day died, and B. took the letters of administration: it was the opinion of the whole Court that the money should be paid to the administrator for he is assignee: and by Gawdy, J.: If the word assignee had been left out, yet the payment ought to be made to the administrator: *quod Coke affirmavit* (u).

But where the condition of an obligation is, that if the obligor pay 20*l.* to such a person as the obligee by his last Will in writing shall appoint it to be paid, then the obligation to be void; if the obligee appoint no person to whom it shall be paid, but makes his last Will, and makes executor

(q) Wentw. Off. Ex. 215, 14th edit. Vin. Abr. Executors (X.), pl. 10.

288.

(s) *Ibid.*

(t) Bro. Abr. tit. Deputy.

(r) Chapman v. Dalton, Plowd.

(u) Anon. 1 Leon. 316.

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Ibid.

Bro. Abr. tit. Deputy.

Anon. 1 Leon. 316.

thereby, yet the 20*l.* shall not be paid to the executors ;
for here it appears that this was to have been paid to an
assignee in deed, to be made by the obligee by his appoint-
ment, and not to an assignee in law (x). The law will never
seek out an assignee in law, when there may be an assignee
in fact (y).

Likewise a right to sue, which never existed in the testator
or intestate, may accrue to the executor or administrator
by remainder : as where a lease is made to B. for life, the
remainder to his executors for years (s), or where a lease for
years is bequeathed by Will to A. for life and afterwards to
B., who dies before A. ; although B. never had the term in
him, yet it shall devolve on his executors, who may maintain
an action in respect of it (a).

So a suit may accrue in the time of the executor or
administrator by reason of a condition made to the deceased.
—As where cattle, plate, or other chattels, were granted by
the testator upon condition that if A. did not pay such a
sum of money, or do some other act as the testator appointed,
&c., and this condition is not performed after the testator's
death, now is the chattel come back to the executor, and
he may maintain an action respecting it : So where the
condition is that the testator or his executors shall pay the
money to avoid the grant ; as where he pledges a jewel or a
piece of plate, and before the day limited for payment, he
dies, his executor is entitled to redeem at the day and place
appointed (b).

If no time be set for the redemption of the pledge, it has
been laid down that the pledgor must redeem during his
life, and his executors cannot redeem (c). But the pledgor

Suits accruing
to executors
by remainder.

Suits accruing
to executor
by reason of
conditions
made to
testator :

in what cases
the executor
of the pledgor
may redeem.

(x) 1 Roll. Abr. 915. Exec-
utors (X.), pl. 2.

(y) Goodall's case, 5 Co. 97, a. ;
see Chapman v. Dalton, Plowd.
288. *Ante*, p. 768.

(z) Wentw. Off. Ex. 189, 14th
ed. Co. Lit. 54, b. *Ante*, p. 614,
seq.

W.E.—VOL. I.

(a) Wentw. Off. Ex. 181, 14th
edit.

(b) Wentw. Off. Ex. 181, 14th
edit. Toller, 164. Bac. Abr. Bail-
ment (B.).

(c) Ratcliff v. Davies, 1 Bulstr.
29. Kemp v. Westbrook, 1 Ves.
Sen. 278, by Lord Hardwicke

is not confined to the lifetime of the pledgee (*d*). The tender should be to the executor of the pledgee (*e*).

Bac. Abr. Bailment (B.). But in the book last cited a query is added, whether Equity would not relieve, unless it was clearly proved that in case of death the benefit of redemption was to be lost. And it is laid down by an eminent writer, that the personal representatives of the pledgor may

redeem, unless he was called upon by the pledgee to do so. Story's Equity, § 1032. See also Story on Bailments, § 348.

(*d*) 1 Bulst. 29. Cro. Jac. 244. 3 Salk. 267. Bac. Abr. Bailment (B.).

(*e*) *Ibid.*

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Bulst. 29. Cro. Jac. 244.
267. Bac. Abr. Bailment

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CHAPTER THE THIRD.

OF THE TITLE OF AN EXECUTOR OR ADMINISTRATOR TO THE
EXECUTORY AND CONTINGENT INTERESTS OF THE TESTATOR
OR INTESTATE.

CONTINGENT and executory interests, whether in real or
personal estate, are transmissible to the representative of a
party dying before the contingency, upon which they depend,
takes effect (a).

Thus in *Pinbury v. Elkin* (b), the testator, in case his wife
should die without issue by him, then, after her decease,
gave 80*l.* to his brother; after the testator's death, the
brother died in the lifetime of the widow, who afterwards
died without leaving any issue: The Court (Lord Maccles-
field) held that this possibility devolved to the executors of
the brother, though he died before the contingency happened;
and decreed the legacy accordingly with interest from the
widow's death.

So in *King v. Withers* (c), the testator devised land to his
son B.; but if he should die without issue male of his body,
then living, or which might be afterwards born, that then
his daughter should receive at her age of twenty-one, or day
of marriage, which should first happen, the sum of 3,500*l.*
(over and above a portion bequeathed to her); but in case
the contingency of the said son's dying should not happen
before his daughter's said age, or day of marriage, that then
she should receive that sum whenever such contingency
might happen; and charged the said legacy or portion on

(a) Fearn, Conting. Rem. 554.

(b) Saund. 388 n., note to Purefoy

(c) Rogers. See also stat. 1 Vict.

c. 26 (the Wills Act), s. 3.

(b) 1 P. Wms. 564.

(c) Cas. temp. Talb. 117.

the real estate: The daughter married, having attained her age of twenty-one, and died in the lifetime of her brother B., who afterwards died without issue male: Lord Talbot decreed, that the legacy should be raised for the benefit of the administrator (the husband) of the daughter: and he held, that though it did not absolutely vest, because it might never arise, yet it so far vested as to be transmissible to the representative. This decree was afterwards affirmed in the House of Lords.

In *Chauncey v. Graydon* (d), legacies were devised to children, to be transferred to them at their respective ages of twenty-one, or days of marriage; and in case any of them should die under that age, or marry without consent, &c., his or her share should go to the others at their ages of twenty-one: Lord Hardwicke held, that a share accruing by the forfeiture of a child's marrying without consent vested in another who attained twenty-one, but died before such forfeiture, so as to entitle the personal representative of such deceased child to an equal share thereof, with the other surviving children; for (said he) where either real or personal estate is given upon a contingency, and that contingency does not take effect in the lifetime of the devisee, yet if real, his heir, and if personal, his executor, will be entitled to it: for though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable, and is transmissible to the representative of the devisee.

So in *Peck v. Parrott* (e), B., in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate after her own decease, granted all her personal estate to trustees in trust for herself during her natural life, and after her decease, and payment of her debts and funeral expenses in trust for the sole and separate use of her niece alone, and not for her husband, or for such person as she should appoint; the niece died in the lifetime

(d) 2 Atk. 616.

(e) 1 Ves. Sen. 236.

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Ves. Sen. 236.

Ch. III.] *Contingent and Executory Interests.*

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of B.; and after B.'s death, her (B.'s) executor and residuary legatee filed his bill against the personal representative of the niece, for this personal estate: Lord Hardwicke said, that, under a trust, a contingent interest might go to the executor or administrator, though not vested in the person during his life; and that in the same manner the contingent interest here would go to the representative of the niece; and accordingly dismissed the bill.

These cases, and others referred to in the note below (f) establish the principle, that contingent and executory interests, though they do not vest in possession, may vest in right so as to be transmissible to executors or administrators. But it is obvious that where the contingency, upon which the interest depends, is, the endurance of the life of the party entitled to it till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to his executors or administrators.

This consideration leads directly to that portion of the doctrine of Lapsed Legacies, which has reference to lapse occasioned by the death of the legatee before the death of the testator, or before any other period, upon the arrival of which in the lifetime of the legatee, the right to the legacy depends. But it will be convenient to postpone the investigation of this doctrine, and to consider it hereafter, together with the subject of Legacies generally.

It may be observed in this place, that the executor or administrator of the object of a power cannot be an appointee under it: Thus where a husband gives his wife a power of appointment of a fund in favour of his children, and a child dies without any appointment having been made to him, no part can be appointed to his executor or administrator (g).

The executor of the object of a power cannot be an appointee.

(f) *Barnes v. Allen*, 1 Bro. C. C. Meriv. 130.

181. 3 Ves. 208. *Perry v. Woods*, (g) *Maddison v. Andrew*, 1 Ves. 3 Ves. 234. *Massey v. Hudson*, 2 Sen. 59.

CHAPTER THE FOURTH.

OF THE CONTINUANCE BY THE EXECUTOR OR ADMINISTRATOR
OF ACTIONS COMMENCED BY THE TESTATOR OR INTESTATE.

THE practice with respect to the continuance of suits when the cause of action survives to the executor or administrator of the deceased is now regulated by Order XVII. of the Rules of the Supreme Court, 1883, which enacts:—

Change of
parties by
death, &c.

“Rule 1. A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy, of any of the parties if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*, and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but the judgment may in such case be entered, notwithstanding the death.

2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest (if any) of such party, be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the cause or matter as may be just.

3. In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by, or against, the person to, or upon whom, such estate or title has come or devolved.

4. Where by reason of marriage, death, or bankruptcy, or

any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte*, on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence.

5. An order obtained as in the last preceding rule mentioned shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

6. Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the cause or matter, shall be served with such order as in Rule 4 mentioned, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the service thereof.

7. Where any person being under any disability other than coverture, and not having had a guardian *ad litem* in the cause or matter, is served with any such order as in Rule 4 mentioned, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days

from the appointment of a guardian *ad litem* for such party, and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person.

8. When the plaintiff or defendant in a cause or matter dies and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued), may apply by summons to compel the plaintiff (or the person entitled to proceed), to proceed within such time as may be ordered; and in default of such proceeding, judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the plaintiff has died, the execution may issue as in the case provided for by Order XLII. rule 23.

9. Where any cause or matter becomes abated, or in the case of any such change of interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the cause-book opposite to the name of such cause or matter.

10. Where any cause or matter shall have been standing for one year in the cause-book marked as 'Abated,' or standing over generally, such cause or matter at the expiration of the year shall be struck out of the cause-book."

This order, so far as it relates to the death of a plaintiff or defendant, seems to be in substance a re-enactment of the provisions of the Common Law Procedure Act, 1852. Before that Act, if a sole plaintiff or defendant died before verdict or judgment by default, the plaintiff or his executor was obliged to commence a new action against the defendant or his executor, provided the cause of action survived to or against the executor. But by sect. 135 of the Common Law Procedure Act, 1852, it was enacted that the death of a plaintiff or defendant should not cause the action to abate but that it might be continued as provided by that Act. And by sect.

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137, in case of the death of a sole plaintiff or the sole surviving plaintiff, the legal representative of such plaintiff might, by leave of the Court or a Judge, enter a suggestion of the death, and that he was the legal representative, and the action thereupon proceeded, and the truth of the suggestion was triable thereat, and the judgment followed the verdict as if the person making such suggestion was originally plaintiff. This section did not apply to personal actions which would not survive to the executor (a).

So also that part of the above Rule (1), which enacts that there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but that the judgment may, in such case, be entered, notwithstanding the death, takes the place of the provision of section 139 of the Common Law Procedure Act, 1852 (b), which was a re-enactment of the stat. 17 Car. II. c. 8, sect. 1, which related to proceedings at Common Law, and the 52nd section of 15 & 16 Vict. c. 86, which dealt with the procedure in equity.

This portion of the rule extends, as did the old law, to all personal actions, notwithstanding that the cause of action could not have survived to the representative of the deceased, as for libel, negligence, &c.

Under the procedure in force before this Rule, in the case of the death of a party between verdict and judgment, judgment might be entered as if the party were still living, but there must have been a revival by the executor to get execution (c). The statute of 17 Car. II. referred to above was held to make a judgment entered up under it equivalent to a judgment entered up during the lifetime of the deceased party (d). It did not apply to a non-suit (e), but, as it has

(a) Flinn v. Perkins, 32 L. J. r. 23.
Q. B. 10.

(b) Repealed by stat. 46 & 47
Vict. c. 49, sect. 3.

(c) A writ of revivor is no longer necessary, but leave must be obtained under Order XLII.
(d) Colebeck v. Peck, 2 Ld. Raym. 1280. Burnett v. Holden, 1 Lev. 277.
(e) Dowbiggin v. Harrison, 10 B. & C. 480.

already been shown, it did apply to actions which do not survive to the executor (*f*). The death of either party before the assizes (*g*) was not remedied by the Act, but his death after the assizes began (*h*), or after the first day of the sittings *Nisi Prius* though before the trial (*i*), was remedied, for the assizes are but one day in law.

Where sole
plaintiff dies;
right of his
representa-
tive:

rights of
defendant.

In the case of the death of a sole plaintiff or a sole surviving plaintiff it is necessary for the personal representative of the plaintiff to get an order for leave to continue the action (*k*), and if he does not do so, so that there is no person before the Court in whom the action is vested, the action if called on for trial will be struck out (*l*). Or the defendant (or the person against whom the cause or matter may be continued), may apply by summons to compel the plaintiff (or person entitled to proceed) to proceed within such time as may be ordered, and in default of such proceeding, judgment may be entered for the defendant (*m*), or it would seem the action may be dismissed for want of prosecution (*n*); but it would seem, in such case, that the defendant must, before applying to dismiss, either get an order appointing some person to represent the estate of the deceased, under Order XVI. rule 46, or where there is a personal representative, give notice to him. Or the defendant may get an order staying the action (*o*).

Death of
plaintiff
between
verdict and
judgment.

An executor obtaining an order to continue an action even after judgment becomes liable for costs *ab initio* in the same manner as if the action had been commenced by him (*p*). If the plaintiff dies between verdict and judgment, judgment may be entered notwithstanding the death, but where an

(*f*) Palmer v. Cohen, 2 B. & Ad. 966. Kramer v. Waymark, L. R., 1 Exch. 241.

(*g*) Taylor v. Harris, 3 B. & P. 549.

(*h*) Anon. 1 Salk. 8.

(*i*) Jacobs v. Miniconi, 7 T. R. 31.

(*k*) Re Atkins' Estate, 1 C. D. 82.

(*l*) Eldridge v. Burgess, 7 C. D. 411.

(*m*) Ord. XVII. r. 8.

(*n*) Wright v. Swindon Ry. Co. 4 C. D. 164. Wingrove v. Thompson, 11 C. D. 419.

(*o*) Warder v. Saunders, 1 Q. B. D. 114.

(*p*) Boynton v. Boynton, 4 App. Cas. 733.

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ridge v. Burgess, 7 C. 1.

d. XVII. r. 8.

right v. Swindon Ry. Co.
D. 164. Wingrove

n, 11 C. D. 419.

arder v. Saunders, 1
114.

pynton v. Boynton, 4 Ap

change has taken place, by death, or otherwise, in the parties
entitled to execution, the party alleging himself to be entitled
to execution may apply to the Court or a judge for leave to
issue execution accordingly, and such Court or a judge, if
satisfied that the party so applying is entitled to issue execu-
tion, may make an order to that effect, or may order an issue
to be tried (q). Where, after judgment, the plaintiff died,
having made a Will and appointed executors, an application to
the Court *ex parte* on behalf of the executors for leave to
issue execution was granted on production of the probate, and
unless the executor has obtained such leave he is not entitled
to issue a bankruptcy notice (r). Formerly the mode in which
an executor got execution, where a sole plaintiff died after final
judgment and before execution, was by reviving the judgment.

It should seem that no motion for a new trial can be
made where the plaintiff has died since the trial, until pro-
bate or administration to the deceased has been obtained (s).

The power (which formerly existed) of the Court or judge
to order judgment to be entered *nunc pro tunc* is confirmed by
Order XLI. rule 3, of the Rules of the Supreme Court, 1883,
which now govern the procedure, whereby it is enacted that
where any judgment is pronounced by the Court or a judge
in Court, the entry of the judgment shall be dated as of the
day on which such judgment is pronounced, unless the Court
or judge shall otherwise order, and the judgment shall take
effect from that date, *provided that by special leave of the Court
or a judge, a judgment may be ante-dated or post-dated.*

At common law an administrator *de bonis non* could not
revive a judgment obtained by the original executor or
administrator; for he comes paramount the judgment, and
is no party thereto (t). But by statute 17 Car. II. c. 8, s. 2
(now repealed), the administrator *de bonis non* might revive a
judgment or decree obtained by an executor or administrator

Leave to issue
execution.

New trial can-
not be applied
for before ad-
ministration
granted.

Entry of
judgment *nunc
pro tunc.*

Revival by
administrator
de bonis non :

17 Car. II.
c. 8.

(q) Ord. XLII. r. 23.

N. S. 667.

(r) *Re Woodall*, 13 Q. B. D.

(t) *Snappe v. Norgate*, Cro. Car.

167.

167.

(u) *Lloyd v. Ogleby*, 5 C. B.

or perfect an execution already begun by the executor or administrator. Such cases seem now to fall within the above-mentioned Order.

Writ of *fi. fa.* issued in the life of judgment creditor may be executed after his death.

If the plaintiff die after a *fi. facias* sued out, the writ may, notwithstanding, be executed, and his executor or administrator shall have the money; or if there be no executor, and administration be not as yet granted, the money shall be brought into Court, and there deposited until some person appear to claim it as representative of the deceased (*u*).

After judgment and before execution.

Formerly, where one of several plaintiffs in a personal action died after judgment and before execution, execution could be had by the survivors within a year after payment, without reviving the judgment. But the execution in such case had to be taken out in the joint names of all the plaintiffs, or else it would not have been warranted by the judgment.

This case would now seem to be governed by Order XLII. rule 23, since there has been a change in the parties entitled to execution.

And where judgment has been given against two or more defendants, if one or some of such defendants dies within six years after judgment and before execution, execution may still be issued against the estates of the survivors or survivor without obtaining any order for that purpose; but if it is desired to enforce the judgment against the estate of the deceased person or persons, an order under Order XLII. rule 23, Rules of the Supreme Court, 1883, is necessary (*x*).

Where *certiorari* lies for executors.

An inquisition of *felo de se*, before the coroner *super visum corporis* (*y*), may be removed by the executors or administra-

(*u*) Clerk v. Withers, 2 Lord Raym. 1072. 1 Chit. Archb. 881, 14th edit. A writ of sequestration, however, is suspended by the death of the person at whose instance it issued, until it is revived. Wharham v. Broughton, 1 Ves. Sen. 183.

(*x*) Davis v. Andrews, W. N.

(84), 94. D. C. P., 6th edit., p. 883.

(*y*) The coroner has no jurisdiction if the body cannot be found, as he can only hold an inquest *super visum corporis*: see the Coroners Act, 1887, 50 & 51 Vict. c. 71, sect. 4.

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4. D. C. P., 6th edit.

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the body cannot be found.
can only hold an inquest
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ers Act, 1887, 50 & 51 Vict.
sect. 4.

tors of the deceased into the Queen's Bench Division by *cer-
tiorari*, and there quashed (z); or the inquisition may, after such
removal, be *traversed* by the executors or administrators (a).

Generally speaking, the death of the plaintiff countermands
a warrant of attorney to confess judgment (b). Yet, if the
warrant of attorney be to enter up judgment *at the suit of A.*,
his *executors or administrators*, it seems that on the death of
A., the Court will give his executors or administrators leave
to enter up judgment thereon (c). But judgment cannot be
entered up after the death of the plaintiff, on a warrant of
attorney empowering him to enter up judgment to secure the
payment of a sum of money to the plaintiff, his *executors*
and *administrators* (d).

When an
executor may
enter up
judgment on
a warrant of
attorney given
to deceased.

(e) In former times inquisitions
were quashed for a variety of
technical defects usually of a trivial
character, but modern legislation
has rendered such objections im-
material. See 14 & 15 Vict.
c. 100, §§ 24, 25 and 30, and
24 & 25 Vict. c. 100, § 6. And
the new Coroners Act, 1887, 50 &
51 Vict. c. 71, § 20, enacts that
"if in the opinion of the Court
"having cognisance of the case an
"inquisition finds sufficiently the
"matters required to be found
"thereby, and where it charges a
"person with murder or man-
"slaughter sufficiently designates
"that person and the offence
"charged, the inquisition *shall not*
"be *quashed for any defects*, and the
"Court may order the proper
"officer of the Court to amend
"any defect in the inquisition and
"any variance occurring between
"the inquisition and the evidence
"offered in proof thereof, if the
"Court are of opinion that such
"defect or variance is not material
"to the merits of the case, and
"that the defendant or person

"traversing the inquisition cannot
"be prejudiced by the amendment
"in his defence, or traverse on the
"merits."

(a) 1 Saund. 363, note to Toomes
v. Etherington, S. P. 6 B. & C.
627, by Lord Tenterden. The
modern practice relating to applica-
tions by *certiorari* for the removal
of inquisitions for the purpose of
quashing them, the removal of
inquisitions for trial, and the
traverse of inquisitions is dealt
with in Messrs. Short & Mellor's
Crown Practice, pp. 106-113.

(b) Co. Lit. 52, b. Tidd's Pract.
551, 9th edit. If the warrant be
given to two or more, and one of
them die, the survivor may obtain
leave to enter up judgment at
his suit: Fendall v. May, 2 M.
& S. 76. 2 Chit. Arch. 13th edit.
pp. 768-769.

(c) Coles v. Haden, Barnes, 44.
As to the necessary affidavit of
execution in such a case, see Bald-
win v. Thompson, 2 Dowl. 591.

(d) Henshall v. Matthew, 7
Bingh. 337. Foster v. Claggett, 6
Dowl. 524.

However, formerly, if the plaintiff died in vacation, within a year after the giving of the warrant of attorney, judgment might be entered up of course, at any time after, in the vacation (*e*); and it would have been a good judgment at common law, as of the preceding term, though it was not so upon the Statute of Frauds, in respect of purchasers, but from the signing (*f*). By rule 56, Practice Rules H. T. 1853, it was provided that all judgments should be entered of record of the day of the month and year, whether in term or vacation, when signed, and should not have relation to any other day. Now, however, by Rules of the Supreme Court 1883, Order XLI. rule 4, it is provided that in all cases where the judgment has not been pronounced by a Court or a judge the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of entry, and the judgment shall take effect from that date.

When an executor may proceed on an arbitration commenced by testator.

The authority of an arbitrator is determined by the death of either party before award made: even where the submission is by order of *nisi prius*, and a verdict is taken for the plaintiff, subject to the award (*g*). But it is now usual to insert in the order of reference a clause providing, that in the case of the death of either of the parties before the making of the award, it shall be delivered to their personal representatives (*h*). And where such a clause is inserted in the order of *nisi prius* or rule of Court, or deed or other

(*e*) Tidd's Pract. 551, 9th edit.

(*f*) Tidd's Pract. 551, 9th edit.

(*g*) Potts v. Ward, 1 Marsh. 366. Toussaint v. Hartop, 7 Taunt. 571. Cooper v. Johnson, 2 B. & A. 394. Rhodes v. Haigh, 2 Barn. & Cress. 345. It is extremely questionable, as a general proposition of law, whether the death of one of the parties on one side avoids an award: *Per Tindal, C. J., In re Hare*, 6 Bingh. 163. But where an action would not abate

by reason of the death of one party it seems probable that reference of that action is not vacated by such death, but that the power of the arbitrator remains to bind the survivors though not the personal representatives of the deceased: *Edmunds v. Cox*, 4 Chitt. 432. Russell on Arbitrators, 5th edit. 161.

(*h*) See the observations of Abbott, C. J., in *Cooper v. Johnson*, 2 Barn. & Ald. 395.

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Russell on Arbitrators
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instrument under which the submission to arbitration is
affected, an award made after the death of either party
appears to be valid and available for or against the executors
or administrators (i). This, however, must be understood as
limited to an action in which the cause of action survives for
against the personal representatives of the deceased party.
So where the parties to an action for a tort agreed before trial
to refer the matter in dispute to an arbitrator, the order of
reference containing a clause that the arbitrator should publish
his award, "ready to be delivered to the parties in difference
such of them as require the same (or their respective per-
sonal representatives if either of the said parties die before the
making of the award)," and, where after the hearing of the
reference had been concluded, but before the award was made,
the plaintiff died, it was held that the cause of action, being
a tort, died with the plaintiff, and did not pass to his personal
representatives by force of the clause above-mentioned, which
in an action of tort was inoperative, and the executors who
took up the award were not entitled to be substituted for their
testator as plaintiff (k).

In an action where the cause of action survives for, and
against, personal representatives, if either party dies *after* the
award is made under an order of *nisi prius*, where a verdict
has been taken, subject to the award, judgment may be
entered notwithstanding the death, under the provisions of the
Rules of the Supreme Court, 1883, Order XVII. rule 1. The
power of the Court to order judgment to be entered *nunc pro*
tunc has been already referred to *ante*, p. 779.

It may here be mentioned that the authority of an attorney
in a cause is determined by the death of his client : conse-
quently, if, after a verdict for the plaintiff, and pending a rule

The authority
of an attorney
in a cause is
determined by
the death of
his client.

(i) Tyler v. Jones, 3 B. & C.
144. Clarke v. Crofts, 4 Bingham.
143. Macdougall v. Robertson, 2
T. & Jerv. 11. Rogers v. Stanton,
Taunt. 575 (n). But it cannot
be enforced by attachment : New-
man v. Walker, Willes, 315. 3 B.

& C. 146.
(k) Bowker v. Evans, 15 Q. B.
D. 565. *Aliter* where the cause
of action has been determined and
the damages only are referred to
an arbitrator for assessment :
Chapman v. Day, 48 L. T. 907.

for a new trial, the plaintiff dies, no cause can be shown against the rule until there is a personal representative (*l*). Cause cannot be shown on behalf of the attorney who claims a lien on the verdict for his costs (*m*). So where money is paid into Court by a defendant who dies before verdict or interlocutory judgment, if the suit abates, the money can be paid out of Court, only to the personal representative of the defendant; and an application on the part of his attorney will not be entertained (*n*).

22 & 23 Vict.
c. 35, s. 26.
Executor
making pay-
ments under
power of
attorney not
to be liable by
reason of the
death of party
giving such
power.

By stat. 22 & 23 Vict. c. 35, s. 26, no trustee, executor or administrator making any payment or doing any act *bona fide* under any power of attorney shall be liable by reason thereof, if the person who gave the power of attorney was then dead, or had done some act to avoid the power without the knowledge of the trustee, executor, or administrator.

(*l*) *Shoman v. Allen*, 1 Man. & Gr. 96, note (*c*). But where after a verdict for the defendant, he died, and then the plaintiff obtained a rule for a new trial calling on the "legal representatives of the defendant or their attorneys," to show cause, and it was served on the latter; it was held that cause might be shown by counsel instructed by the attorneys acting for the executors named in the

Will, though they had not proved it; and the Court distinguished *Shoman v. Allen*, on the ground that in that case there was no person who could be served with the rule; in the present case there was: *Thomas v. Dunn*, 1 C. 139.

(*m*) *Shoman v. Allen*, 1 M. & Gr. 96, n. (*c*).

(*n*) *Palmer v. Reiffenstein*, Mann. & Gr. 94.

BOOK THE FOURTH.

THE ESTATE OF SEVERAL EXECUTORS OR ADMINISTRATORS, OF
THE ESTATE OF AN EXECUTOR OF AN EXECUTOR, AND OF AN
ADMINISTRATOR DE BONIS NON ; AND OF THE ESTATE OF AN
EXECUTRIX OR ADMINISTRATRIX, WHO IS A FEME COVERT.

CHAPTER THE FIRST.

THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR CONSIDERED,
WHEN THERE ARE SEVERAL EXECUTORS OR ADMINISTRATORS.

If there be several executors or administrators, they are regarded in the light of an individual person (a). They have joint and entire interest in the effects of the testator or intestate, including chattels real (b), which is incapable of being divided ; and in case of death such interest shall vest in the survivor (c), without any new grant by the Court (d). Consequently, if one of two executors or administrators grant or release his interest in the testator's or intestate's estate to the other, nothing shall pass ; because each was possessed of the whole before (e). So, if one of several executors release his part of the debt, it has been held that the whole is discharged (f).

Among several,
executors, &c.,
each hath the
whole estate.

(a) 3 Bac. Abr. 30, tit. Exors.
(D. 1).

(b) Anon. Dyer, 23, b. Com. Dig.
Admon. (B. 12).

(c) See the judgment of Parke,
in Nation v. Tozer, 1 Cr. Mees.
R. 174.

(d) Ante, p. 411. See *infra*,
W.E.—VOL. I.

Pt. III. Bk. I. Ch. II. as to
the distinction taken by some
authorities between Executors and
Administrators.

(e) Godolph. Pt. 2, c. 16, s. 1.

(f) Godolph. Pt. 2, c. 16, s. 1.
But if one executor of several
alone sell goods of the testator,

Again, if two men have a lease or term of years, as executors, and the one of them grant all his right and interest, and all that appertains to him by virtue of the lease, to A., the whole term of years passes; because every executor has an entire authority and interest; otherwise of other joint-tenants of a term (*g*). Therefore, if a lease of a thousand acres of land comes to two executors, no partition or division can be made between them, as between joint lessees of land, where each hath but a moiety in interest, though possession of and throughout the whole: but among executors each hath the whole; and, therefore, if he grants his part he grants the whole (*h*). Yet one executor may demise or grant the moiety of the land for the whole term, and so may the other: And by this means they may settle a moiety for each in some third person intrusted for them (*i*).

Since several executors have a joint and entire interest in all the goods of their testator, including chattels real, it follows that the act of one, in possessing himself of the effects, is the act of the others, so as to entitle them to a joint interest in possession, and a joint right of action, if they are afterwards taken away (*k*).

Several executors cannot sue on a promise made jointly with one of them:

Again, since several executors or administrators have a joint and entire interest in the estate in action of the deceased, it follows, that they cannot maintain an action in right of the deceased, upon a contract made by the defendant jointly with one of themselves (*l*). Therefore, to an action

he alone may maintain an action for the price, not naming himself executor: Godolph. *ubi supra*. Wentw. Off. Ex. 224, 14th edit. Brassington v. Ault. 2 Bingh. 177: So if goods be taken out of the possession of one of several executors: Godolphin and Wentworth, *ubi supra*. And, generally, if one executor alone contracts on his own account, he *must* sue alone on such contract, notwithstanding the money recovered will be assets:

Heath v. Chilton, 12 M. & W. 632. *Ante*, p. 765.

(*g*) Anon. Dyer, 23, b.

(*h*) Dyer, 23, b. *in margine*. Godolph. Pt. 2, c. 16, s. 2.

(*i*) Godolph. Pt. 2, c. 16, s. 2.

(*k*) Nation v. Tozer, 1 Cr. Mees. & R. 174. 4 Tyrwh. 563, by Parke B. But see note (*f*) *supra*.

(*l*) Godolph. Pt. 12, c. 6, s. 2. — v. Adams, 1 Younge, 117. But see *post*, Pt. III. Bk. I. Ch. 12.

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see note (f) *supra*.

dolph. Pt. 12, c. 6, s. 2.

. Adams, 1 Younge, 117

post, Pt. III. Bk. I. Ch. II.

of assumpsit by several executors, it was held a good plea
in bar, that the promises were made by the defendant jointly
with one of the plaintiffs: And Mr. Justice Buller said, "the
promise was made jointly with one of the plaintiffs: How
can he sue himself in a Court of Law? It is impossible to
say a man can sue himself" (m).

With respect to the power of one of several executors or
administrators over the estate of the deceased, that sub-
ject will be more conveniently further discussed hereafter
together with the power of executors and administrators
generally (n).

Power of one
of several
executors, &c
over the
estate.

(m) *Moffat v. Van Millengen*,
Bos. & Pull. 124, note (c). *Fitz-*
gerald v. Borl'm, 6 B. Moore, 332.
to bringing the action by the
surviving executors after the death

of that executor who was a co-
contractor with the defendant, see
Rose v. Poulton, 2 B. & Adol. 822.

(n) *Infra*, Pt. III. Bk. I. Ch. II.

CHAPTER THE SECOND.

OF THE ESTATE OF AN EXECUTOR OF AN EXECUTOR, OR OF AN
ADMINISTRATOR DE BONIS NON: AND OF THE ESTATE OF A
FEME COVERT EXECUTRIX OR ADMINISTRATRIX.

Executor of
executor.

AN executor of an executor, in however remote a series has the same interest in the effects of the first testator as the first and immediate executor (*a*). With respect, indeed to *choses in action*, it should seem to have been established at common law, that an executor of an executor could not bring actions in respect of the original testator (*b*). But by statute 25 Edw. III. st. 5, c. 5, it is enacted, that executors of executors shall have actions of debts, accompts, and of goods carried away of the first testators. An executor of an executor is within the equity of the statute of 3 Hen. VIII. c. 37, with respect to remedies for rent arrear in certain cases (*c*).

Administrator
de bonis non.

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie, and were not administered by the first executor or administrator (*d*). Also it is holden that if an executor receives money in right of

(*a*) Wentw. Off. Ex. c. 20, p. 462, 463, 14th edit. Com. Dig. Administration (G.).

(*b*) Wentw. Off. Ex. c. 20, p. 461, 14th edit. It is difficult to see on what principle this doctrine rested; especially as it was held at common law, that execution might be sued out on a judgment or statute by an executor of an executor: *Ibid*.

(*c*) Wentw. Off. Ex. c. 20, p. 462, 14th edit. *Infra*, p. 797.

(*d*) Wankford v. Wankford, 1

Salk. 306, by Lord Holt. B. Abr. Executors (B. 2), 2. L. who possessed of furniture and other property, and on his death, intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E., and continued during the period to use the furniture: In October, 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did.

OND.

EXECUTOR, OR OF AN
OF THE ESTATE OF AN
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this testator, and lays it up by itself, and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie (e). And wherever assets are in the hands of a third person, at the death of an administrator, or executor intestate, the administrator *de bonis non* may sue for their recovery (f).

There is such a privity of estate between the former executor or administrator, and the administrator *de bonis non*, that, in *assumpsit* brought by the administrator *de bonis non*, the promise may be laid to have been made to the former executor or administrator (g). So if a former administrator

In 1838, the furniture was sold by the defendant (who had married another daughter of L.), with E.'s concurrence : In 1840 disputes having arisen about the distribution of the proceeds), E. took out administration to her mother : It was held, that E. could not maintain trover for the furniture without having taken out administration *de bonis non* to L. : *Elliott v. Kemp*, 7 M. & W. 306.
(c) *Wankford v. Wankford*, 1 B. & C. 306. Bac. Abr. Executors (B. 2), 2.

(f) *Langford v. Mahony*, 4 Dr. & Warr. 81, 107. In that case a firm of solicitors in Ireland were employed by an administrator, to recover a debt due to his intestate, and they had a power of attorney from the administrator, who was resident in England, authorizing them to receive moneys, and to act generally for him in all matters connected with the affairs of the administration : The solicitors paid over to the administrator certain sums, which they received during the course of the proceedings, and retained the residue in payment of

their costs : the bill of costs was not delivered to the administrator during his lifetime, but, after his death, an account was furnished to his executors by the solicitors, setting forth these costs, and applying in payment thereof the sums which they had retained out of the sums paid to them in the course of the proceedings, and from which it appeared that the costs incurred exceeded the sum retained by a sum of about 10%. In this account the executors acquiesced, although it did not appear that there ever had been any formal settlement of it : and there was no taxation of the costs : It was held by Sugden, C., of Ireland, affirming the order of the Master of the Rolls, that an administrator *de bonis non* of the intestate was entitled to have the bill referred for taxation, and that, under the circumstances, the settlement with the executors of the administrator was not a bar to such right.

(g) *Hirst v. Smith*, 7 T. R. 182. *Moseley v. Rendell*, L. R. 6 Q. B. 338 See *ante*, p. 764.

enters into an agreement for the sale of a lease of a chattel interest belonging to the intestate, and dies before the agreement is completed, the administrator *de bonis non* stands in such privity of estate that he will be compelled to carry the agreement into execution (h).

If the original executor or administrator has fraudulently alienated the assets for his own use in collusion with the vendee (i), such assets will be considered, in equity, as unadministered, and will consequently pass as such to the administrator *de bonis non*; who in that character may apply to a Court of Equity to have the sale set aside, and to have the legal estate conveyed to him. Thus where a testatrix having directed that a leasehold should be sold, and the money divided among five persons, the administrator with the Will annexed, alleging that he had become entitled to it by an agreement with the legatees, assigned it over for valuable consideration: And it was holden, that, at his death, it remained assets unadministered, and that the purchaser must be directed to convey it to the administratrix *de bonis non*, though the persons beneficially interested were not all parties to the suit (k). It must however be observed, that if the administrator, in his character of administrator, had sold the property, and the purchaser had been ignorant of the real nature of the transaction, the sale could not have been set aside (l).

If by some of the means specified in an earlier part of this Work (m), the property in any of the effects of the deceased has been changed by the original executor or administrator, and has vested in him in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator *de bonis non*. Thus, in *Drut v. Baylie* (n), an administrator made an underlease of the

(h) *Hirst v. Smith*, 7 T. R. 182, Russ. Chan. Cas. 549.
183, by Lord Kenyon.

(i) See *infra*, p. 804, *et seq.*

(k) *Cubbridge v. Boatwright*, 1

(l) See *infra*, p. 802, *et seq.*

(m) *Ante*, p. 566.

(n) 1 Freem. 462.

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intestate's term of years, reserving rent to himself, his execu-
tors, &c., with a covenant to pay the rent, and died: and it
was holden, that his executor, and not the administrator *de*
bonis non, should have the rent. So in *Skeffington v. White-*
hurst (o), it was holden by Alderson, B., that upon the death
of an administrator, who has mortgaged the leasehold estate
of his intestate, reserving the power of redemption to him-
self, his executors, administrators, and assigns, the equity
of redemption vests in the personal representative of the
administrator, and not in the administrator *de bonis non* of
the intestate. But on appeal to the House of Lords from
this decision, although it was affirmed on other grounds,
Lords Cottenham, Brougham, and Campbell, did not concur
with the view which the learned Baron had thus taken of
the case (p); for that although no action at law could be
brought on the mortgage deed, except in the name of the
personal representative of the administrator, yet when it is
clear that he has no claim on the estate, and that the admin-
istrator *de bonis non* is the person to whom a reconveyance
must ultimately be executed, there seems no reason why
the latter should not be allowed to file a bill against the
mortgagee to redeem (q).

Again, the administrator *de bonis non* is entitled to all
debts due and owing to the original testator or intestate;
but in this instance also, the original executor or adminis-

(o) 3 Younge & Coll. 1.

(p) *Skeffington v. Budd*, 9 Cl.
& F. 220, 248.

(q) The decision of Lord Not-
tingham in *Butler v. Bernard*, 2
Freem. 139, was considered by
Alderson, B., as one which
governed the case before him.
But in the House of Lords it was
observed by Lord Campbell, that
in *Butler v. Bernard* it seems to
have been taken that the repre-
sentative of the administrator had
no claim on the estate, so that,

when a reconveyance had been
executed to him, he would not
have been accountable to the
administrator *de bonis non*; and
Lord Nottingham intimated no
opinion that a bill to redeem may
not be maintained by the adminis-
trator *de bonis non*, where the
representative of the administrator,
after the estate had been re-
conveyed to him, might himself
be called on to convey to the
administrator *de bonis non*.

trator may, in some cases, have so altered the property in a *chose in action*, as to transmit it to his own personal representative, and not to the administrator *de bonis non*. Thus, where A. died intestate, and his son took out administration to him, and received part of a debt, being rent arrear to the intestate, and accepted a promissory note for the residue, and then died intestate; it was held that this acceptance of the note was such an alteration in the property as vested in the son, and, therefore, on his death, it should go to his administrator, and not to the administrator *de bonis non* (r).

But it should seem from the case of *Catherwood v. Chabaud* (s), that where the substituted cause of action is such that the first executor or administrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non* of the original deceased: for he succeeds to all the legal rights which belonged to the first executor or administrator in his representative capacity (t). Therefore where a bill of exchange was endorsed generally, but delivered to S. C., as administratrix of I. C., for a debt due to the intestate, and S. C. died before the bill became due and before it was paid; it was held that the administrator *de bonis non* of I. C. might sue upon the bill (u). In such cases it does not follow, because the administrator *de bonis non* may sue, that the representative of the original executor or administrator may not sue: there may be instances where the latter might and ought to sue: viz., if the first administrator or executor has made himself a debtor to the estate of the original deceased for the amount of a bill received in payment of a debt due to that estate (x).

With respect to enforcing judgments obtained by the original executor or administrator, the rights of the administrator *de bonis non* which were formerly governed by 17

(r) *Barker v. Talcot*, 1 Vern. 433. Bac. Abr. Executors (B. 2), 2.

(s) 1 Barn. & Cress. 150.

(t) See *ante*, p. 764.

(u) *Catherwood v. Chabaud*, 1 Barn. & Cress. 150.

(x) *Ib.* 156, *per* Lord Tenterden.

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own personal repre-
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tor *de bonis non* (r).

f *Catherwood v. Cha-*
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nal deceased: for he
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156, per Lord Ten-

(Car. II. c. 8, s. 2 (now repealed), would seem now to be governed by Rules of the Supreme Court, Order XLII. r. 23.

If the original executor or administrator, in his own name, brings trespass for goods taken out of his possession, which were the testator's or intestate's and dies, his own executor or administrator must take execution of the judgment; but in the case of an executor of an executor, he shall hold the proceeds of the execution as assets of the first testator, and in the case of an executor or administrator of an original administrator, or of an administrator of an original intestate executor, he shall be compelled in equity to pay them to the administrator *de bonis non* (y).

Although marriage was before the passing of the Married Women's Property Act, 1882, an absolute unqualified gift by the wife to the husband of all the goods and personal chattels which she was possessed of at that time, or became so afterwards *in her own right*, yet the marriage made no gift to him of the goods and chattels which belonged to his wife *in her right* as executrix or administratrix: because such a gift might prove disadvantageous to the creditors, &c., of the testator or intestate: besides, since the wife took no beneficial interest in the property, there was none which the law could transfer to her husband (z).

Of the estate of an executrix who is a *feme covert*.

Since the commencement of the Married Women's Property Act, 1882 [*i.e.*, 1 Jan. 1883], a married woman is by virtue of the provisions of section 1 (2), capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any "contract . . . in all respects as if she were a *feme sole*."

By section 24 of the Act it is provided that the word "contract" in the Act shall include the acceptance of any trust, or the office of executrix or administratrix.

This Act places a married woman, whenever married, in the position of a *feme sole*, and as it is further provided by

(y) *Yaites v. Gough*, Yelv. 33. Pinchell, 11 Mod. 178. 1 Roper,

(z) Co. Lit. 351. *Thompson v. Husband and Wife*, 187, 2nd edit.

section 24 that the husband of an executrix or administratrix shall not be subject to any liabilities incurred by his wife by reason of any breach of trust or devastavit committed by her as executrix or administratrix, either before or after her marriage, unless he has acted or intermeddled in the trust or administration, there ceases to be any reason for his administering in his wife's right for his own safety, as there was before the passing of the Act.

21 & 22 Vict.
c. 108.

By stat. 21 & 22 Vict. c. 108, s. 7, it is enacted, that "the provision in this Act, and in the stat. 20 & 21 Vict. c. 85, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or *shall* become entitled as executrix, administratrix, or trustee, since the sentence of separation, or the commencement of the desertion (as the case may be), and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix" (a).

The wife's
power over her
estate as
executrix.

As to the wife's power over her estate as executrix, it will be proper to consider the question hereafter (b), together with the subject of the power of a *feme covert* executrix or administratrix generally.

(a) As to estate vested in a married woman as executrix, after a protection order under the Divorce Act, but prior to the

passing of this Statute, see *Bathe v. Bank of England*, 4 K. & J. 564.

(b) Pt. III. Bk. I. Ch. IV.

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III. Bk. I. Ch. IV.

PART THE THIRD.

OF THE POWERS AND DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF THE POWER AND AUTHORITY OF AN EXECUTOR OR ADMINISTRATOR.

CHAPTER THE FIRST.

OF THE POWER AND AUTHORITY OF AN EXECUTOR OR ADMINISTRATOR GENERALLY.

AFTER the administration is granted, the power of an administrator is equal to, and with, the power of an executor (a).

It has already appeared in the course of the inquiry into the quality and quantity of the estate of an executor or administrator, that, as an executor or administrator has the same property in the personal effects as the deceased had when living, so he has the same power to bring actions to recover them (b). It is clear that an

Power of executor or administrator to bring action.

(a) Touchst. 474.

(b) *Ante*, p. 695, *et seq.* In *Cobbett v. Clutton*, 2 C. & P. 471, the relation of the defendants had in their possession a box containing papers belonging to the deceased: The box, with its contents, was sent by him to the office of the defendants, who were solicitors,

to be delivered to the plaintiff, as executor, on his giving a schedule of the deeds contained in the box: The plaintiff demanded the box and its contents from the defendants, but they refused to deliver it up, unless the plaintiff would give them a schedule of its contents: And Lord Tenterden held

executor *de son tort* cannot bring any action in right of the deceased (c).

Power of executor to enter the house of the heir.

Within a convenient time after the testator's death, or the grant of administration, the executor or administrator has a right to enter the house descended to the heir, in order to remove the goods of the deceased (d); provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall and parlour be open, he cannot therefore justify forcing the door of any chamber, to take the goods contained in it; but is empowered to take those only which are in such rooms as are unlocked, or in the door of which he shall find the key (e). He has also, a right to take deeds and other writings relative to the personal estate out of a chest in the house if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action (f). On the other hand, if the executor or administrator, on his part, be remiss in removing the goods within a reasonable time, the heir may distrain them as *damage feasant* (g).

Power of executor to distrain.

Where a lessee for years underlets the land and dies, his personal representative may distrain, at common law, for the arrears of rent which became due in the lifetime of the

that the defendants had no right to insist on the inventory, before they gave up the box: that the plaintiff, as executor, was entitled to the possession of the papers of the deceased; and that, being so, he was entitled to bring an action of trover, on the defendants' refusal to give them up.

(c) Bro. Abr. Administration 8. It should, however, be observed, that an executor *de son tort*, being in possession of goods of the de-

ceased, has sufficient title to maintain an action for taking them away, or injuring them, against a mere wrongdoer. See *ante*, p. 233.

(d) Wentw. Off. Ex. 202, 14th edit.

(e) *Ibid.* Toller, 255.

(f) Wentw. Off. Ex. 81, 202, 14th edit.

(g) Wentw. Off. Ex. 202, 14th edit. Plowd. 280, 281. Stoddard v. Harvey, Cro. Jac. 204.

deceased : because these arrears were never severed from the reversion, but the executor or administrator has the reversion, and the rent annexed thereto, in the same plight as the deceased himself had it : and it is not like a reversion which descends to the heir, while the arrears go to the executor or administrator (*h*).

But, at common law, the executors or administrators of a man seised of a rent-service, rent-charge, rent-seck, or fee-farm, in fee-simple, or fee-tail, or for his own life or *pur autre vie*, could not distrain for the arrears incurred in the lifetime of the testator or intestate (*i*). To remedy this, the statute 32 Hen. VIII. c. 97, was passed, which, enacts that it shall be lawful to every executor and administrator of any person or persons unto whom rent or fee-farm is or shall be due, and not paid at the time of his death, to *distrain* for the arrears of all such rents or fee-farms, upon the lands, tenements, and other hereditaments which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, so long as the said lands, tenements or hereditaments continue, remain and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter afore said.

And by section 4, tenants *pur autre vie*, their executors or administrators may sue or distrain for arrears due during the life, and unpaid after the death, of the *cestui que vie* in like manner as at Common Law they might have done during his life.

(*h*) *Wade v. Marsh*, 1 Roll. Abr. Latch. 211.

672, tit. Distress (O.) 13. S. C. (*i*) Co. Lit. 162 a.

32 Hen. VIII. c. 97. Executors, &c., may distrain for rent due to their testator, &c., in his lifetime.

Power of executors of tenants *pur autre vie* to distrain.

The statute applies only to cases in which the owner of the rent, if he had lived, might have distrained; and therefore, if the rent be in arrear, and the owner grants away his interest and dies, his executors or administrators shall have no remedy for these arrearages (*k*).

The statute gives the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him from whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent, *ad infinitum* (*l*): But they cannot be distrained upon for such rent, if they be in the hands of one claiming paramount to him; and therefore, if the lord enter upon the grantor for an escheat, the land shall not be distrained upon for arrears of rent (*m*). So where a man makes a lease for life, rendering rent, remainder for life, remainder in fee, and after the accruing of rent from the first tenant for life, the lord dies and then the tenant for life dies, the executors cannot distrain upon the remainder-man; because he claims not by or from the tenant for life (*n*). And if tenant in tail grant a rent for life, and die, the executor of the grantee cannot distrain upon the issue in tail, who comes in under the original gift in tail, and not under the grantor of the rent (*o*). But if a man grant a rent-charge to A. for the life of B., and lets the land to C. for life, the remainder to D. in fee, the rent is in arrear for many years, B. dies, and afterwards C. dies: A. may distrain D. in remainder for all the arrears, by the statute (*p*).

All manner of arrears of rent issuing out of a freehold or inheritance, whether they be in money, or in corn, cattle, fowls, pepper, spurs, gloves, or any other profit to be delivered, are within the statute, and that whether they be annual, or

(*k*) Co. Lit. 162, *b*. Ognel's case, 4 Co. 50 *b*.

(*l*) Co. Lit. 162, *b*. Ognel's case, 4 Co. 50, *b*.

(*m*) Co. Lit. 162, *b*.

(*n*) Co. Lit. 162, *b*.

(*o*) Lambert v. Austin, Cro. Eliz. 333. Lord Fairfax v. Lord Derby, 2 Vern. 612.

(*p*) Co. Lit. 162, *b*. Edrich's case, 5 Co. 118.

which the owner of the land is entitled to; and therefore, if the tenant pays away his interest, the landlords shall have no claim.

ess upon the lands out of which they continue in the land, due, or of any person, or under him, by whom.

(l) : But they cannot be in the hands of the landlord, therefore, if the lord of the land shall not be in possession. So where a man grants a rent, remainder for life, and then the tenant for life dies, the remainderman; and if the tenant for life dies, the executor of the tenant for life, who comes under the grantor of the rent-charge to A. for the life, the remainder to D. dies, and afterwards the remainder for all the

g out of a freehold or copyhold, or in corn, cattle, or other profit to be delivered, or they be annual, or

ambert v. Austin, Cro. Eliz. 612. Lord Fairfax v. Lord Derby, 3 Leon. 59.

o. Lit. 162, b. Etlich's case, 118.

every two, three or four years : But work-days, or any corporal service or the like, are not within it (q) : Neither are arrears of a *nomine pœne* (r).

It has been holden that rents issuing out of freehold lands are alone within the statute ; consequently that it does not extend to enable executors or administrators to distrain for the arrear : of rents issuing out of copyhold (s).

(q) Co. Lit. 162, b.

(r) *Ibid.*

(s) Appleton v. Doily, Yelv. 135.

Ball. N. P. 57. But in Gilb. Ten. 186, 187, 188, there is the following passage : " In the supplement to my Lord Coke's Treatise of Copyholds, (s. 21, Tracts 216,) it is said that the 32 Hen. VIII. c. 8, concerning remedies for arrears of rent, extends not to copyholds. To prove which, a case is cited in 2 Leon. 109, which is this : A lord of a manor, whereof were divers copyholders, granted a rent-charge for life, and afterwards made a feoffment of the manor to J. S. in fee, who granted a copyhold for life to B. ; J. S. died, and the grantee of the rent died, and his executors distrained for the arrears in B.'s copyhold lands ; and it is there said, it was held by the Court that the distress was not well taken ; and the reason is, because the words of the statute are *claiming only by and from him* ; and the copyholder doth not only claim by the grantor, but by custom. This opinion, as it seems, was upon the first hearing of the cause ; for the very case is reported quite contrarily by the same reporter, 2 Leon. 102, 3 Leon. 59. Moor. 812 ; and it is said to be resolved by all the judges but Fenner, that the copyholder should be charged with the

rent-charge ; for the custom is no part of his title, but only appoints how he shall hold : and since it was charged in the lord's hands, it is plainly within the intent and meaning of the Act, as well as the words, to be charged in the copyholder's hands ; and to this purpose there is a case in Dyer, 270, b. adjudged. But if the case were adjudged, that the lands should not be charged in the copyholder's hands on that reason, that he doth not claim only by and from, &c., but by custom, yet that would never warrant so general a conclusion, that the statute in no other part should extend to copyholds, and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain. But turn the tables, and if the Act of Parliament doth in point extend to copyholds, as lands that are claimed by, &c., and that which in this case only doth make a doubt, is overruled, then this is a strong argument, that in other cases, where that is not which occasioned the doubt, the statute shall extend to copyholds, especially since the Act was made to remedy an apparent wrong, and doth no harm either to lord or tenant."

Distress by
executor of
lessor who has
leased for a
term or at
will :

If a man makes a lease for life or lives, or a gift in tail, reserving a rent, this is a rent-service within the statute of Hen. VIII. (t). But whether if a person seised in fee of land demises it for years, reserving rent, his executor or administrators could, under this statute, distrain for arrears of rent incurred in his lifetime, was a question which had been much discussed, and was not settled until the cases of *Prescott v. Boucher* (u), and *Jones v. Jones* (x), which decided the point in the negative; on the ground that the deceased was not tenant in fee simple, or indeed tenant at all, of the rent.

3 & 4 Will. IV.
c. 42, s. 37.

But now by statute 3 & 4 Wm. IV. c. 42, s. 37, it is enacted, "that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime in like manner as such lessor or landlord might have done in his lifetime."

By sect. 38, it is further enacted, "that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid."

Executors may
join in dis-
training or one
of several exe-
cutors may
distrain alone.

Executor of
administrator
who has
underlet.

Several executors or administrators may all join in distraining, or any one may distrain alone, for the whole rent due for they are regarded in the light of an individual person (y).

If an administrator makes an underlease of a term of years of the deceased, reserving rent to himself, his executors, &c.

(t) Co. Lit. 162, b.

(u) 3 B. & Ad. 849.

(x) 3 B. & Ad. 967.

(y) 3 Bac. Abr. 30, tit. Exor
(D.) 1.

lives, or a gift in tail, within the statute of person seised in fee of rent, his executor or te, distrain for arrears a question which had settled until the cases *es v. Jones* (x), which on the ground that the le, or indeed tenant at

IV. c. 42, s. 37, it is the executors or admin- distrain upon the lands the arrearages of rent lifetime in like manner e done in his lifetime. "that such arrearages determination of such ner as if such term o ed, provided that such of six calendar months or lease, and during the tenant from whom such that all and every the statutes made relating ble to the distresses s

rs may all join in dis e, for the whole rent due an individual person (y) lease of a term of years nself, his executors, &c.

3 Bac. Abr. 30, tit. Exec

it has been held that his executors, and not the administrator *de bonis non*, shall have the rent: but it should seem that they cannot distrain for it (z), because the reversion belongs to the administrator *de bonis non*; and a reversion is necessary to found the remedy by distress (a).

It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors (b), much less by legatees, either general or specific, into the hands of the alienee (c). The principle is, that the executor or administrator, in many instances, must sell, in order to perform his duty in paying debts, &c.: and no one would deal with an executor or administrator, if liable afterwards to be called to account (d).

(z) *Drue v. Baylie*, 1 Freem. 392, 403. See *ante*, pp. 790, 791.

(a) See *Burne v. Richardson*, 4 Taunt. 720.

(b) Nor can they be followed by one who has paid off a debt of the testator's or who has made advances to the executor to enable him to do so: *Haynes v. Forshaw*, 11 Hare, 93. It is plain that a creditor has no specific right against the leaseholds, or against any other chattel of the deceased debtor of which the executor may have taken possession. He has a right to sue the executor and to obtain a decree against him. But it is doubtful whether upon a common decree for an account any right would attach upon the leaseholds or upon any specific chattels, unless the decree also directed a sale of such leaseholds or chattels: per Wood, V.-C., in *Simpson v. Morley*, 2 Kay & J. 71, 75, 76.

(c) *Whale v. Booth*, 4 T. R. 625, note to *Farr v. Newman*. Nugent v. Giffard, 1 Atk. 463. See also

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Spackman v. Timbrell, 8 Sim. 260, where a testator bequeathed leaseholds to his son, and appointed him and another person his executors: Three years after the testator's death, the son settled the leaseholds, on his marriage: And Sir L. Shadwell, V.-C., held that as against the son's wife and children, the property was not liable to the testator's creditors. See also *Dilkes v. Broadmead*, 2 De G. F. & J. 566, *Accord*. So where an executrix, after probate and after judgment recovered against her for a debt due from her testator, assigned all his property and effects to trustees for the benefit of his creditors, the assignment was held valid as against the judgment creditor: *Wolverhampton Bank v. Marston*, 7 H. & N. 148.

(d) By Lord Mansfield in *Whale v. Booth*. So if a temporary executor or administrator has sold the goods there is no remedy against the vendees: *Chandler v. Thomp-*

The executor has an absolute power over the whole personal estate: the assets cannot be followed into the hands of his alienee:

even specific legacies :

the executor may mortgage the assets :

The power of the executors to dispose of a chattel specifically bequeathed seems to have been formerly questioned (e); but succeeding cases in modern times have established it beyond dispute (f).

As an executor may absolutely dispose of the testator's assets for the general purposes of the Will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the Will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets (g). And, accordingly, the power of an executor or administrator to mortgage the assets has been recognized by high authorities on several occasions (h). The mortgage

son, Hob. 266 : unless the transaction be fraudulent, as where an administrator *durante minore etate* sold East India stock, and the buyer had full notice that it was the stock of the infant : *Munn v. Dunkin*, Finch. R. 298. See *infra*, p. 804.

(e) *Humble v. Bill*, 2 Vern. 444.

(f) *Ewer v. Corbet*, 2 P. Wms. 149. *Burting v. Stonard*, 2 P. Wms. 150. *Langley v. Lord Oxford*, Amb. 17. Lord St. Leonards in his Treatise on Vendors and Purchasers (vol. ii. p. 56, 9th edit.), considers it doubtful whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest : and he cites *Tomlinson v. Smith*, Finch. 378. But Mr. Coote (Mortg. 5th ed. 309) observes that that was a case of gross fraud ; and concludes from all the cases, that if a purchaser or mortgagee shall *bond fide* deal with an executor, within a reasonable time after the testator's death, and obtain

possession of the muniments of title, a specific legatee would never be permitted, at law or in equity, to set up the executor's assent against the sale or mortgage ; for by sale and delivery, the title of the purchaser or mortgagee is complete. However, the general rule certainly is that, at law, the title to any specific thing bequeathed, vests, upon the assent of the executor, absolutely in the legatee, so as to enable him to bring an action of ejectment for a chattel leasehold, or trover for the goods which are the subject of the legacy. (See *post*, Pt. V. Bk. II. Ch. 1.) And even in equity, if the legatee, after the assent, were to assign to a *bond fide* purchaser, the title of such an assignee would, it should seem, be better than that of any subsequent purchaser from the executors. See *post*, Pt. III. Bk. III. Ch. IV. § III.

(g) Coote on Mortg. 5th ed. 309.

(h) By Lord Hardwicke in *Mead v. Orrery*, 3 Atk. 239 : by Lord Thurlow in *Scott v. Tyler*, 2 Dick. 725 : and by Lord Eldon in *M'Leod*

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v. Bk. II. Ch. 1.) And
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assent, were to assign to a
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cutor. See *post*, Pt. III. Bk. III.
§ III.

note on Mortg. 5th ed. 309.
by Lord Hardwicke in Mead-
y, 3 Atk. 239: by Lord
in *Scott v. Tyler*, 2 Dick.
by Lord Eldon in *M'Leod*

may be either of legal or equitable assets (i), or of mere
chooses in action (k), and may be by actual assignment, or by
deposit (l), and it may properly give the mortgagee a power
of sale (m). So, the executor may pledge a part of the
assets for the purpose of better enabling him to administer
the estate; and it should seem that the pledgee may sell the
things pledged, if they are not redeemed within the proper
time (n). The power to mortgage is not taken away by the
mere commencement of an administration action, where no
receiver has been appointed and no injunction granted (nn).

Again, it is not incumbent on the purchaser or mortgagee
of the assets to see the money properly applied, although he
knew he was dealing with an executor (o). "It is of great
consequence," said Lord Thurlow, in *Scott v. Tyler* (p), "that

a purchaser
from an exe-
cutor is not
bound to see
to the appli-
cation of the
purchase-
money:

r. *Drummond*, 17 Ves. 154. *Child*
v. *Thorley*, 16 C. D. 151.

(i) *Nugent v. Giffard*, 1 Atk.
463. *Coote on Mortg.* 5th ed. 310.

(k) *Scott v. Tyler*, 2 Dick. 724.
Vane v. Rigden, L. R. 5 Ch. 667.

(l) *Ibid.* *Coote on Mortg.* 5th
ed. 310.

(m) *Russell v. Plaice*, 18 Beav. 21.

(n) *Russell v. Plaice*, 18 Beav.
23, 29.

(nn) *Berry v. Gibbons*, L. R. 8
Ch. 747.

(o) *M'Leod v. Drummond*, 17
Ves. 154. Although an executor
or administrator, purporting to act
as such, will generally confer a
good title upon an alienee to whom
he conveys or transfers a legal es-
tate or title, and the alienee has no
obligation to see the consideration
money properly applied, yet as
the executor or administrator has
no right to raise money for his
own purposes or otherwise than for
the purpose of the performance of
the duties of administration, so a
mortgage for purposes foreign to
the administration will be set aside
as against a mortgagee who has

notice of the purpose for which the
money is raised: *Ricketts v. Lewis*,
20 C. D. 745. In the argument
in *Re Morgan*, 18 C. D. 93, Fry, J.
put three possible cases: (i) An
executor as executor borrows money
ostensibly for executorship pur-
poses on the security of the testa-
tor's assets; that is a valid transac-
tion (*Berry v. Gibbons*, L. R. 8 Ch.
747); (ii) A man, known to be an
executor, borrows on the security
of the assets admittedly for his own
private purposes; that is invalid.
(*Wilson v. Moore*, 1 M. & K. 337);
(iii) An executor, not known to be
such, borrows money for his own
private purposes on the security of
that which appears to be his own
property but which is really the tes-
tator's property. This last was the
case before Fry, J., and he held that
the transaction was invalid, and his
decision was confirmed by the
Court of Appeal, but the mortgage
was an equitable mortgage only by
deposit. The conflict here, it is to
be noted, was between two equi-
table titles.

(p) 2 Dick. 725.

no rule should be laid down here which may impede executors in their administration, or render their disposition of the testator's effects unsafe or uncertain to a purchaser: His title is complete by sale and delivery: *what becomes of the price is of no concern to him.* This observation applies equally to mortgages or pledges, and even to the present instances where assignable bonds were merely pledged without assignment."

exception
where there is
collusion be-
tween the pur-
chaser and
the executor :

In the case of a legal transfer exceptions to the general power of the executor or administrator to dispose of the estate of the testator or intestate will be found in those cases only where *collusion* exists between the purchaser, or mortgagee, and the personal representative. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage; it must further appear that the purchaser or mortgagee participated in the *devastavit*, or breach of duty in the executor (*q*).

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If, therefore, a man concert with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue (*r*), or by applying the real value to the purchase of other subjects, for his own behoof, or in any other manner, contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*s*).

Thus, where the person to whom the executor collusively passes the property knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is

(*q*) *Whale v. Booth*, 4 T. R. 625, note.

(*r*) Thus, a sale by an administrator to his brother and co-partner was set aside, it appearing to the Court, from the evidence, that the sale was made at an undervalue so gross, that it ought to be

deemed fraudulent and void: *Rice v. Gordon*, 11 Beav. 265.

(*s*) By Lord Thurlow in *Scott v. Tyler*, 2 Dick. 725. See also the stat. 43 Eliz. c. 8, (*ante*, p. 210) as to treating the collusive purchaser as an executor *de son tort*.

may impede executor's disposition of the property to a purchaser: His observation applies even to the present case, where the executor has already pledged with-

reference to the general disposition of the estate in those cases only where the executor, as purchaser, or mortgagee, or as executor may waste or invalidate the sale or the purchase or, or breach of duty

transaction, and turn it in concert with an executor at a nominal price, or by applying the proceeds, for his own use, to the duty of the executor, involve the seeming liability to the full

executor collusively acting in concert with the persons interested in the property, the fraud vitiates the transfer of the property is

fraudulent and void: Rice v. Beav. 265. Lord Thurlow in Scott v. Dick. 725. See also 43 ELIZ. c. 8, (ante, p. 10) treating the collusive sale as an executor *de son*

ineffectual and void: Therefore, in *Doe v. Fallows* (t), where an administratrix, being indebted to an attorney for rent, executed to him a mortgage of leasehold property belonging to her intestate, which falsely recited that 300*l.* was paid as a consideration; and the next of kin, not knowing the facts, were induced, by misrepresentation, to execute the mortgage; and the jury at the trial found that the deed had not been fairly obtained; the Court of Exchequer held, that the mortgagee was not entitled to recover in ejectment against the next of kin, because of the fraud; nor against the administratrix, who was the widow of the intestate, as to her share of the term, because, as the accounts of the estate had not been wound up, it could not be ascertained whether there would be any surplus, or any part which would belong to the widow (u).

Formerly at Law (x), it was laid down, that the executor might make a valid sale of the effects in satisfaction of his own private debt, although the purchaser knew the goods sold were the goods of the testator or intestate (y). But in Equity it seems to be established, that, generally speaking, the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of his own debt: on the principle that the transaction itself gives the purchaser

whether a sale in satisfaction of an executor's private debt be valid:

(t) 2 Crompt. & Jerv. 481.

2 Cr. & J. 483.

(u) It is submitted, with great deference, that the correctness of this decision may be doubted. Surely the assignment of the term passed the legal estate from the administratrix to the lessor of the plaintiff: and, therefore, he was entitled to recover at law, though the assignment might be void at law with regard to the execution of the creditors of the intestate against the goods of the intestate: or, in equity as against the next of kin.

(x) See the observations of Lord Mansfield, in *Whale v. Booth*; and of Bayley, B., in *Doe v. Fallows*,

(y) *Whale v. Booth*, 4 T. R. 625, in *notis.* *Farr v. Newman*, 4 T. R. 642, 645. But Lord Mansfield intimated in *Whale v. Booth*, that if the purchaser *knew the debts were unpaid*, it would be a fraud and vitiate the sale. The rule, as laid down by Bayley, B., in delivering the judgment of the Court in *Doe v. Fallows*, 2 C. & J. 483; 2 Tyrwh. 462, was that the executor might make an effectual disposal of the assets in consideration of a debt of his own, and to discharge his own debt, if there were no fraud in the creditor in accepting of such disposal.

or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty (z).

If the executor be also specific legatee, a sale or mortgage from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shown that the purchaser or mortgagee knew there were debts unpaid (a).

Where there exists such collusion as to render the dealing invalid, not only a creditor, but a legatee, whether general or specific, is entitled to follow the assets (b). But they must enforce their right within a reasonable time, or it will be barred by their acquiescence (c).

An executor cannot be allowed, either immediately or by

where there is collusion legatees as well as creditors may follow the assets :

an executor cannot pur-

(z) *Bonney v. Ridgard*, 1 Cox, 145, 148. *Scott v. Tyler*, 2 Bro. C. C. 433. *Hill v. Simpson*, 7 Ves. 152. *Andrew v. Wrigley*, 4 Bro. C. C. 136, by Lord Alvanley. *M'Leod v. Drummond*, 17 Ves. 154, 170, by Lord Eldon. *Keane v. Robarts*, 4 Madd. 357, 358, by Sir J. Leach. *Watkins v. Cheek*, 2 Sim. & Sta. 205. *Cubbridge v. Boatwright*, 1 Russ. Chanc. Cas. 549. *Wilson v. Moore*, 1 M. & K. 337. *Eland v. Eland*, 4 M. & Cr. 427, by Lord Cottenham. *Pannell v. Hurley*, 2 Coll. 241. *Haynes v. Forshaw*, 11 Hare, 99, by Wood, V.-C. *Cole v. Muddle*, 10 Hare, 186. *Downes v. Power*, 2 Ball & B. 491. *Collinson v. Lister*, 20 Beav. 356. *Re Morgan*, 18 C. D. 93, 98, *per Fry*, J. *Ricketts v. Lewis*, 20 C. D. 745. And now since the Judicature Act, 1873, it seems that the rule established in Equity will govern the case, as it is provided in that Act (s. 25, sub-s. 11), that generally in all matters, in which there is any conflict or variance between the rules of Equity and the rules of Common Law with re-

ference to the same matter, the rules of Equity shall prevail. It must not, however, be understood from this that the legal and equitable rights should be treated as identical, but only that the Court should administer both legal and equitable principles. *Joseph v. Lyons*, 15 Q. B. D. 280. *Cooper v. Vesey*, 20 C. D. 612. *Manners v. Mew*, 29 C. D. 725. But it is not enough to impeach a mortgage by an executor that the advances were originally made to him without security and that the security was afterwards added: *Miles v. Durnford*, 2 De G. M. & G. 641.

(a) *Taylor v. Hawkins*, 8 Ves. 209. *Hall v. Andrews*, 27 L. T. 195; 20 W. R. 799. *Coote on Mortg.* 5th ed. 311.

(b) *Hill v. Simpson*, 7 Ves. 152. *M'Leod v. Drummond*, 17 Ves. 169. *Wilson v. Moore*, 1 M. & K. 337.

(c) *Elliott v. Merriman*, 2 Atk. 41. *Andrew v. Wrigley*, 4 Bro. C. C. 125. *M'Leod v. Drummond*, before Sir W. Grant, 14 Ves. 353, 359, 363. S. C. before Lord Eldon, 17 Ves. 152.

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Q. B. D. 280. *Cooper*

20 C. D. 612. *Manners*
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ott *v. Merriman*, 2 Atk.
drew *v. Wrigley*, 4 Bro. C.
M'Leod *v. Drummond*,
r W. Grant, 14 Ves. 333.
S. C. before Lord Eldon,
52.

means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (d).

But the executor of a deceased partner is warranted, in equity as well as at law, in selling the share of the deceased to the surviving partners, if this can be done fairly and properly: Though when such a relation subsists between the parties, Courts of Justice will look at such transactions with close attention; for in dealings between the executor of a deceased partner and the surviving partners there may be an inequality in respect of knowledge, which may be taken advantage of in such a way as to lead to inequitable and unfair results (e).

A sale is not avoided merely because, when entered upon, the purchaser may at his option become trustee for the property purchased (e.g. by proving a will under which he was named executor), if in point of fact he never does become such. Such a purchaser is under no disability, and, in order to avoid such sale, it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld (f).

It is a general rule, deducible from the principles which have been above investigated, that executors and administrators may, by virtue of their office, dispose absolutely of

chase the
assets from
himself:

an executor of
a deceased
partner may
sell his share
to the survi-
ving partners.

Power of exe-
cutors to as-
sign leases:

(d) *Hall v. Hallett*, 1 Cox, 134.
Watson v. Toone, 6 Madd. 153.
It was held in the case of *Mackintosh v. Barber*, 1 Bingh. 50, that executors, to whom a power is given to sell, may at law sell to a trustee for themselves or may sell to one of themselves. Whether such a sale can be supported in equity must depend upon the circumstances under which it was made (1 Sugd. on Powers, 141, 6th ed.) It seems that the rules of equity will, since the Judicature

Act, govern the matter.

Executors having been directed by a will to sell the real estate, if they allow one of their number to hold buildings at less than a fair occupation rent, are chargeable with what would have been a fair occupation rent: *De Cordova v. De Cordova*, 4 App. Cas. 692.

(e) *Chambers v. Howell*, 11 Beav. 6.

(f) *Clark v. Clark*, 9 App. Cas. 733.

and make
underleases :

terms for years, which are vested in them in right of their testators or intestates (g) ; and may make a good title, even against a specific legatee, unless the disposition be fraudulent : So an executor or administrator may make an underlease of such term by leasing it for a fewer number of years and the rent reserved shall be assets in his hands, and go in a course of administration (h).

This, however, is an exceptional mode of dealing with the assets, and those who accept the title in that way, must take it subject to the question whether it was the best way of administering the assets (i).

And although an executor or administrator may grant an underlease, if necessary for the due administration of the property, he cannot give an option of purchase at a future time (k).

If the executor or administrator dies without having administered the whole estate, it is not in the power of the executor of such executor or the administrator *de bonis non*, to avoid any such disposition made by the executor or administrator during his life.

what under-
leases by exe-
cutors are good
in equity :

In a case in the Court of Chancery in Ireland (l), where the children and widow of an intestate had agreed to divide his personal estate, including a lease of a farm for years, according to the Statute of Distributions, and afterwards the widow, not being disposed to abide by the arrangement, took out administration, and leased the farm at an undervalue to a person who had express notice of the

(g) Bac. Abr. Leases, (I.) 7.

(h) *Ibid.*

(i) *Oceanic Steam Co. v. Sutherland*, 16 C. D. 236, by Jessel, M.R., *ib.*, p. 243. In *Keating v. Keating*, 1 Lloyd & Goold, 133, Sir E. Sugden, C., observed that many circumstances would justify an executor in equity in granting a lease instead of selling the premises, and he would sustain such a lease by an executor simply

acting in a due administration of the assets, but that a person could not be permitted to hold a reversionary lease from an executor with full notice, without showing that such lease was properly granted in the due administration of the executor's office.

(k) *Oceanic Steam Co. v. Sutherland*, 16 C. D. 236.

(l) *Drohan v. Drohan*, 1 Ball. & Beat. 185.

them in right of their
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the executor's office.

ceanic Steam Co. v. Suther-
6 C. D. 236.

ohan v. Drohan, 1 Ball.
185.

agreement between the widow and children, and that she
was by them called on to sell the intestate's interest in the
farm; Lord Manners, C., set aside the lease on the appli-
cation of the children, and expressed his opinion that even
if the lease were at full value, yet, being taken by a person
having notice that a sale was called for, it could not be
sustained.

It should be observed, that it has been held that a bequest
of leaseholds to executors, *upon trust to sell*, and to invest
the proceeds for the benefit of persons, some of whom are
infants, will not enable them to grant an underlease: And
the Court of Chancery will not enforce performance of an
agreement to take such underlease (m).

It remains to consider how far this power of the executor
or administrator to assign or underlet may be restrained by
the provisions contained in the lease itself. If a lease be
made for a term of years, *upon condition*, that if the lessee
shall assign his term without the assent of the lessor, it shall
be lawful for the lessor to re-enter, the term shall nevertheless
rest in the executor or administrator of the lessee without
any breach of such condition (n). But a question arises,
whether when a lease for years, with a condition or covenant
restraining alienation or underletting, comes into the hands
of the executor or administrator, he is warranted in assigning
or making an underlease of it. Where the executor or admin-
istrator is *named* in the condition or covenant, he is bound
thereby: Therefore, if a lease contain a proviso, that the
lessee, his executors and administrators shall not set, let, or

when the
power of an
executor to
assign or
underlet is
restrained by a
condition not
to assign, &c.

(m) Evans v. Jackson, 8 Sim.
217.

(n) Parry v. Harbert, Dyer, 45 b.
It has been questioned whether a
bequest of a term by Will to a
specific legatee is not a breach of a
condition not to alien: Berry v.
Taunton, Cro. Eliz. 331: but see
Cruce v. Bugby, 3 Will's. 237.
Doe v. Bevan, 3 M. & S. 36. On

principle it would seem that the
opinion of Bayley, J., in Doe v.
Bevan, is correct, that *assignment*
and such like words apply only to
transfer *inter vivos*, and that if the
lessor desire to exclude a specific
devise of the term, he must do so
by express words: Woodfall on
Landlord and Tenant, 14th ed.,
681.

assign over the whole or part of the premises, without leave in writing, on pain of forfeiting the lease, the executor or administrator of the lessee cannot assign or underlet, unless by leave in writing, without incurring a forfeiture (o). So in the lessee covenant that he, his executors or administrators, shall not assign, without licence, except by his or their last Will and testament, and the lessee makes his Will and dies, the executors will be bound by the covenant, and cannot sell the term for payment of debts without the licence of the lessor (p). But if the executors or administrators are not named in the proviso or covenant, it may be doubted whether the restriction will extend to them (q). Thus, in an anonymous case in Dyer (r), a question was asked upon these words in a lease, "And it shall not be lawful for the lessee to give, sell, or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term;" the lessor and lessee die, and the executor sells the term without the leave of the heir: And it was holden, that this is out of the case of forfeiture, because the restraint was only during the lives of the lessor and lessee: And yet it was agreed in the bench, that the words above make a condition (s). So in *Seers v. Hind* (t), a point arose whether executors were warranted in disposing of a lease, as assets of the testator, where there was a proviso against alienation by the lessee: And Lord Thurlow said, "if A. lets a farm to B. with covenant not to alien, and B. dies, may not his executors dispose of it? I think it has been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God. I remember, Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a

(o) *Roe v. Harrison*, 2 T. R. 429, by Ashhurst, J. See also 425. See also *Doe v. Bevan*, 3 M. & S. 357. Phillips v. Everard, 5 Sim. 102.

(r) P. 66 a., pl. 8.

(p) *Lloyd v. Crispe*, 5 Taunt. 249.

(s) See also Touchst. 133.

(t) 1 Ves. 294.

(q) *Roe v. Harrison*, 2 T. R.

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v. Everard, 5 Sim. 102.
66 a., pl. 8.
also Touchst. 133.
es. 294.

forfeiture. In case of a lease for years to A., it goes to his
executor, not by way of limitation as in the case of a
remainder over, &c., but as coming in the place of the lessee.
I understood it to be well settled, as I have stated." But
where a lease was made for years upon condition that the
lessee, his executors, or assigns, should not alien without the
consent of the lessor, an assignment by the administrator
of the lessee was held a breach of the condition: on the
ground of the administrator being an assignee within the
condition (u).

As to the question, whether, in case a term for years be
forfeited by reason of the executor or administrator assigning
or underletting without licence, relief can be obtained in
equity; the general rule is, that a Court of Equity will not
afford any relief against a forfeiture occasioned by assigning
without licence (x). However, where a lease contained a
covenant, that if the lessee should let the premises for any
longer period than three years, except to the wife or children
of the lessee, without licence of the lessor and his assigns
first had, then the said lease should be void, and the exe-
cutor of the lessee sold the lease for the payment of the
debts of his testator, the plaintiff, the purchaser, was relieved
against the forfeiture (y).

This subject may be concluded, by observing that the
executor's or administrator's power of disposal over the
assets is not at all controlled or suspended by the mere com-
mencement of an action, on the part of a creditor of the

The executor's
power of dis-
posal over the
assets is not
controlled by
merely com-
mencing an
administration
action.

(u) Sir Wm. More's case, Cro.
Eliz. 26.

(x) Lovat v. Lord Ranelagh, 3
Yes. & Beam. 24. And in the
Conveyancing and Law of Pro-
perty Act, 1881 (44 & 45 Vict. c. 41,
s. 14), where restrictions on, and re-
lief against, forfeiture of leases for
the breach of certain covenants are
given to the lessee, special excep-
tion is made for the case of a

breach of a covenant not to assign,
underlet, part with the possession,
or dispose of the land leased (s. 14,
sub-s. 6); against such a breach
the Act does not extend the power
of relief formerly exercised.

(y) Cox v. Brown, 1 Chanc. Rep.
170: but *quære*, whether there was
any forfeiture in this case see *ante*,
p. 810.

deceased, for the administration of his estate: For the power of the personal representative to alienate and make a good title to any part of the assets continues until there has been judgment in the action (z).

Executor may
endorse a bill
of exchange.

A promissory note or bill of exchange made payable to the deceased or his order, may be endorsed by his executor or administrator (a). And, generally speaking, there is no difference between an endorsement of a note by the deceased and one by his personal representative (b). In a case where the payee of a note, made payable to him or his order, had endorsed it, but had died without having made any delivery of it, and after his death his executors had merely delivered it so endorsed to the plaintiff, it was held that he could not maintain his action on the note:—for that the endorsement of the testator was incomplete without a delivery by him, and the delivery by his executors without any endorsement by them was inefficacious (c).

Provisions of
Bills of
Exchange
Act, 1882.

Where the drawee of a bill is dead, presentment for acceptance may be made to his personal representative (d). The holder now has an option, and presentment is excused, and a bill may be treated as dishonoured by non-acceptance where the drawee is dead (e).

Where the drawee or acceptor of a bill is dead and no

(z) *Neeves v. Burrage*, 14 Q. B. 504.

(a) *Rawlinson v. Stone*, 3 Wils.

1. Where a person is under obligation to endorse a bill in the representative capacity, he may endorse the bill in such terms as to negative personal liability. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (5). And if a person indebted to another gives him a blank acceptance for a certain sum, and the donee subsequently dies, his administrator may fill up the paper as a bill

payable to drawer's order, insert his own name as drawer, and can enforce payment thereof against the acceptor: *Scard v. Jackson*, 34 L. T. N. S. 65; 24 W. R. 159.

(b) *Watkins v. Maule*, 2 Jac. & Walk. 243.

(c) *Bromage v. Lloyd*, 1 Exch. 32; *Bishop v. Curtis*, 18 Q. B. 879.

(d) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 41 (1, c). For the practice prior to this Act see *Smith v. New South Wales Bank*, L. R. 4 P. C. 194, 208.

(e) S. 41 (2, a).

estate: For the power to make a good title until there has been

change made payable to the executor, if speaking, there is no note by the deceased

(b). In a case where the executor or his order, had made any delivery, had merely delivered, held that he could not that the endorsement at a delivery by him, without any endorsement

presentment for acceptance, representative (d). The presentment is excused, and a non-acceptance where

bill is dead and no

to drawer's order, insert name as drawer, and can payment thereof against: *Seard v. Jackson*, 34 S. 65; 24 W. R. 159.

Atkins v. Maule, 2 Jac. & 3.

Damage v. Lloyd, 1 Exch. 100; *Opp v. Curtis*, 18 Q. B. 879. *Acts of Exchange Act*, 1882 (Vict. c. 61), s. 41 (1, c). *Practice prior to this Act* *h v. New South Wales* R. 4 P. C. 194, 208. 11 (2, a).

place of payment is specified, presentment for payment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found (f). Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence (g).

Wherever a power is given, if a personal trust and confidence be thereby reposed in the donee to exercise his own judgment and discretion, he cannot refer the power to the execution of another; for *delegatus non potest delegare*. Therefore, where a power of sale is given to executors, they cannot sell by attorney (h).

Executor cannot exercise a power of sale by attorney.

By the statute 19 Geo. II. c. 37, s. 4, re-insurance on ships is declared generally unlawful: but in case the assurer should die, his executors or administrators might make re-insurance, to the amount of the sum before by him assured, provided it was expressed in the policy to be a re-insurance. The intention of the legislature, in making this exception in favour of executors and administrators, seems to have been to provide a fund to satisfy the assured in case of a loss, without its falling on the estate of the deceased.

Power of executors of assurers to re-assure.

This was repealed, and re-insurance made lawful by statute 30 & 31 Vict. c. 23, ss. 3, 4 (Sched. D), and thus re-insurances are legal by virtue of the Common Law (i) without any necessity for their appearing to be re-insurances on the face of them (k).

In the case of a person insured against fire, the policy of insurance and interest therein shall continue to his heir, executor or administrator respectively, to whom the property

Power of executors of assured to procure endorsement of policy.

(f) S. 45 (7).

(g) S. 46 (1).

(h) *Combe's case*, 9 Co. 75, b.

(i) *Sgd. Powers*, 222, 6th edit.

(i) *Arnould's Marine Insurance*, 6th ed. 103.

(k) *Mackenzie v. Whitworth*, 1 Ex. Div. 36.

insured shall belong, provided, before any new payment be made, such heir, executor, or administrator, shall procure his right to be endorsed on the policy at the office, or the premium to be paid in the name of the heir, executor or administrator.

Power of election by executor.

An executor may in some cases claim by election ; as when the testator, at the time of his death, was entitled out of several chattels to take his choice of one or more to his own use (*l*). If the thing, of which the election is given, is to be done *unicâ vice*, the election ought to be at the time (*m*). So if nothing passed or vested in the grantee, &c., before his election, it ought to be made in the life of the parties (*n*). As if a man gives to A. such of his horses, as A. and B. shall choose, the election ought to be in the life of A. (*o*). But where an interest vests immediately by the grant, &c., election may be made by the heir or executor, as well as by the party himself (*p*). As if a fine be of one hundred acres, and the conusee renders fifty to the conusor for years, his executor may choose which fifty he will have (*q*). If a man gives one of his horses to A. and B., after the death of A., B. may choose which he will take ; for an interest vested in them immediately by the gift (*r*). So if the election determines only the manner or degree in which the grantee shall have the thing, his heir or executor, as well as the party himself, may make it ; for in such case the interest vests immediately (*s*) : As if a lease be granted to A. for ten or twenty years, as he shall elect, the executor is entitled to the election (*t*). So if A. makes a lease for years to B. of forty acres

(*l*) Toller, 174.

(*m*) Com. Dig. Election (B.) Co. Lit. 145, *a*.

(*n*) *Ibid*.

(*o*) *Morris v. Livesay*, 1 Roll. Abr. 726, tit. Election (C.) pl. 6, Com. Dig. Election (B.)

(*p*) Com. Dig. Election (B.).

(*q*) 1 Roll. Abr. 725, tit. Elec-

tion (C.) pl. 4. Com. Dig. *supra*.

(*r*) 1 Roll. Abr. 725, tit. Election (C.) pl. 5. Com. Dig. *supra*.

(*s*) Com. Dig. *ubi supra*. Co. Lit. 145, *o*

(*t*) Toller, 174

any new payment by the executor, shall procure by at the office, or the the heir, executor or

parcel of sixty, the election may be made by B.'s executor (*u*). So if the thing of which election is given, is annual, and to have continuance, the heir or executor may make the election (*x*).

by election; as where A. was entitled out of one or more to his own election is given, is to be at the time (*m*). S. grantee, &c., before his life of the parties (*n*). S. as A. and B. share the life of A. (*o*). By the grant, &c., executor, as well as by the one hundred acres, and for years, his executor have (*q*). If a man after the death of A., B. an interest vested in if the election determined which the grantee shall as well as the party himself the interest vests immediately to A. for ten or twenty is entitled to the election to B. of forty acres

An executor may pay or allow any debt or claim on any evidence that he thinks sufficient. He may, if and as he thinks fit, accept any composition or any security, real or personal, for any debt or for any property real or personal claimed, and may allow any time for payment of any debt, and may compromise (*y*), compound, abandon, submit to arbitration, or otherwise settle, any debt, account, claim or thing whatever relating to the testator's estate, and, for any of those purposes, may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things, as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith (*z*).

Power of executor to accept composition, &c.
44 & 45 Vict. c. 41, s. 37.

(*u*) Jones v. Cherney, 1 Freem. 120.

(*z*) Com. Dig. *ubi supra*. Co. Lit. 145, a.

(*y*) As to the power of executors to compromise debts due from one of them to the estate, see De Cordova v. De Cordova, 4 App. Cas. 652, where such a compromise was set aside and the executor charged with the full amount payable by him if the compromise had never

been effected: the other executors being held liable for so much of the said amount as might have come to their hands but for their wilful default.

(*z*) Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 37. This section applies to executorships constituted or created either before or after the commencement of the Act.

(*z*) pl. 4. Com. Dig. *ubi supra*.

Roll. Abr. 725, tit. Election.

(*z*) pl. 5. Com. Dig. *ubi supra*.

Com. Dig. *ubi supra*. Co. Lit. 145, a.

Coller, 174.

CHAPTER THE SECOND.

OF THE POWER AND AUTHORITY OF ONE OF SEVERAL
EXECUTORS OR ADMINISTRATORS.

Co-executors.

CO-EXECUTORS, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all (a); for they have all a joint and entire authority over the whole property (b). Hence a release of a debt by one of several executors is valid, and shall bind the rest (c). So one of several executors may

Are lease of a debt by one of two co-executors is valid.

(a) Touchst. 484. 3 Bac. Abr. 30. Exors. (C.) 1. Wentw. Off. Ex. 206, 14th edition. *Ex parte Rigby*, 19 Ves. 462. "As between executors," says Lord Hardwicke, "there can be no division of their interest or authority: for though a man may appoint executors in such a manner that their authority may commence or determine at different times, yet he cannot nominate persons executors, and confine one of them to one branch of his estate, and another to another; for they have a joint authority, which extends to the testator's whole estate, and cannot be divided into distinct and separate powers: *Owen v. Owen*, 1 Atk. 495. But see *ante*, p. 201.

(b) 3 Bac. Abr. 30, tit. Executors, (D.) 1. Wentw. Off. Ex. 213, 14th edition. *Owen v. Owen*, 1 Atk. 495.

(c) Anon. Dyer, 23, b., in margin, *Jacomb v. Harwood*, 2 Ves.

Sen. 267. Where an action was brought by two out of four executors and the two executors who were not joined in the action released the defendant, who pleaded the release *puis darrein continuance*; the Court of Exchequer refused to set aside the plea, the plaintiffs having failed to make out a case of fraud: *Herbert and another v. Pigott*, 2 Cr. & M. 384. In *Charlton v. Durham*, L. R. 4 Ch. 433, a testator gave the residue of his estate to two executors on certain trusts. Part of his estate consisted of a bond given by the trustees of a minor, who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly in the place of the bond given by the trustees. Ten years afterwards a part of the money was paid by the obligor to one of the obligees who embezzled the money so paid, and gave a receipt purporting to be

COND.

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settle an account with a person accountable to the estate,
and in the absence of fraud, the settlement will be binding
on the others, though dissenting (d). So a grant or a sur-
render of the term by one executor shall be equally avail-
able (e). So the attornment of one shall be the attornment
of the other (f). And the sale or gift of one of several
executors, of the goods and chattels of the deceased, is the
sale and gift of them all (g). Again, it is said, in the mar-
ginal notes of Lord Chief Justice Treby to Dyer (h), that if
one of several executors confess the action, judgment shall
be given against all (i). But in a case decided, Mich. T.
3 Geo. I. (k), there were three executors, one of whom gave
a warrant of attorney to confess a judgment against himself

signed by both the obligees, but
in fact signed by one only, the
signature of the other being a for-
gery. In a suit by the other
executor and *cestuis que trustent*
under the will against the obligor,
it was held that, though the obligor
intended to have the receipt of
both obligees, the receipt of one
was sufficient to discharge the ob-
ligor, as the obligees were execu-
tors.

(d) Smith v. Everett, 27 Beav.
448. And, where there are two or
more executors of a holder of a bill,
the endorsement of one is *probably*
sufficient to transfer the property
in the bill: Chalmers on Bills of
Exchange, 4th ed., 127.

(e) Dyer, 23, b., in *margin*,
Simpson v. Gutteridge, 1 Madd.
616. See Turner v. Hardey, 9 M.
& W. 770. Post, p. 820, n. (2).

(f) Dyer, 23, b., in *margin*, 1
Madd. 616. So if one executor
take possession of the goods, and
pay debts with his own money as
far as the amount of them, this is
a conversion of the goods of the

testator to his own use, and justi-
fiable by this executor against his
co-executor: Dyer, 23, b., in *mar-
gine*.

(g) Touchst. 484. Kelsock v.
Nicholson, Cro. Eliz. 478, 496,
Dyer, 23, b., in *margin*. A pur-
chaser of the subject of a specific
legacy from one of several executors,
who is also the legatee, is not bound
to enquire whether the other exe-
cutors have given their assent:
Cole v. Miles, 10 Hare, 179. But
where one of two executors, *erro-
neously believing that he was acting
with the authority of the other*, con-
tracted to sell a leasehold house,
part of the testator's estate, it was
held that the purchaser could not
enforce a specific performance of
the contract: Snesby v. Thorne,
7 De G. M. & G. 399.

(h) P. 23, b.

(i) See also the judgment of Sir
John Leach, V.-C., in *Simpson v.*
Gutteridge, 1 Madd. 616; and *Le-
pard v. Vernon*, 2 V. & B. 54.

(k) Elwell v. Quash, Stra. 20.

So is a grant
or surrender
of a term.

So is an
attornment.

So is a sale
or gift of
chattels.

and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor who gave the warrant, *de bonis propriis* for the costs; upon motion to set this aside, it was held to be ill: for executors may plead different pleas (*l*), and that which is most for the testator's advantage shall be received (*m*). Further, it has been held that if one of two executors appointed by the obligee delivers a bond to a stranger in satisfaction of a debt due from himself and dies, although the debt, as a *chose in action*, could not then have passed by the assignment, yet by this delivery the party had such an interest in the instrument, that he might justify the detention of it as against the surviving executor (*n*).

In a case (*o*), where one of several executors assigned to a creditor of the testator a debt due to the testator's estate, it was holden by Sir W. Grant, that such an assignment was not available against the dissent of the other executors: His Honor observed, that if the single executor had parted with any portion of the property to the particular creditor, who by such an assignment had obtained a *legal* advantage, it could not, perhaps, be taken from him; but in the present case there was merely an assignment of a *chose in action*, of which no use could be made without the assistance of a Court of Equity; and that a Court of Equity would not interfere to give a particular creditor an advantage against the other executors and the general creditors.

An assent to a legacy by one of several executors is suffi-

One of two
co-executors
may assent to
a legacy.

(*l*) See *infra*, Pt. v. Bk. II. Ch. I.

(*m*) See *Baldwin v. Church*, 10 Mod. 323.

(*n*) *Kelsock v. Nicholson*, Cro. Eliz. 478, 496. *Dyer*, 23, *b.*, in *margin*. If there be any fraud between the executor and the creditor, and there be not assets be-

sides to pay all the debts and legacies, there, perhaps the other executor may have remedy in equity against his co-executor and the creditor: *Touchst.* 484. See *ante*, p. 805 *et seq.*

(*o*) *Lepard v. Vernon*, 2 V. & B. 51. See *Judicature Act*, 1873, s. 25, sub-s. 6.

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s. 6.

cient (p). So, also, if one of several executors be a legatee, his single assent to his own legacy will vest the complete title in himself (q). Again, if the subject be entire, and be given to all the executors, the assent of one of them to his own proportion will be sufficient (r).

By stat. 33 & 34 Vict. c. 71, the Bank of England may require all the executors, who have proved the will to join and concur in any transfer of stock standing in the name of their testator (s).

Again, there has already been occasion to show (t), that the act of one of two executors, in possessing himself of the testator's effects, is the act of the other, so as to entitle him to a joint interest in possession, and a joint right of action, if the effects are afterwards taken away: But it should be observed, that the act of one in taking possession of a chattel real or personal of the testator, cannot create a new liability and impose a charge on the other personally, and in his own individual character, which, without such act, would never have existed. Therefore, if one executor takes possession of and uses a personal chattel, the other is not liable to the creditors for such act of his co-executor. So if one executor enter and enjoy land demised, and take the profits beyond the rent, the other executor will not be chargeable with the amount as assets to the creditors; but the one who actually received will alone be responsible (u). Hence, it appears, that with respect to the creditors, the actual possession and use by one of two executors is not in law the possession and

How far the act of one executor can impose a charge on his companion.

(p) Godolph. Pt. 2, c. 30, s. 8, p. 245. Wentw. Off. Ex. 413, 14th edition. Com. Dig. Administration (C. 3).

(q) 1 Roll. Abr. 618, tit. Devise, B. pl. 2. Townson v. Tickell, 3 B. & A. 31, 40. Cole v. Miles, 10 Hare, 179.

(r) Pannel v. Fen, 1 Roll. Abr. 618, Devise, (B.) pl. 3. 1 Rep. Leg. 734, 3rd edition.

(t) *es ante*, p. 722. Nor is a

transfer by one of two executors of railway shares or stock registered in the names of both, of any validity, since these are governed by the Companies Clauses Act: Barton v. North Staffordshire Ry. Co., 38 C. D. 464. See also Barton v. L. & N. W. Ry. Co., 24 Q. B. D. 77.

(u) *Ante*, p. 786.

(u) See *post*, Pt. IV. Bk. II. Ch. II. § II.

use by both, so as to attach a liability upon both: Accordingly if, instead of disposing of a term of the testator, one of the executors takes the actual possession of and enjoys the land demised, such enjoyment is not by law the possession and enjoyment by both, and it does not render both chargeable to the lessor to pay a compensation to him for it, as joint occupiers in their own right (*x*).

The question how far a *devastavit* or receipt of assets by one of several executors can create a liability and impose a charge on his companions, will be considered hereafter, when the subject of the Liabilities of Executors occurs (*y*).

One of several executors cannot bind the others by his contract.

It should be further observed, that though one of several executors may dispose of the assets so as to bind the others, it is not to be inferred that one of several executors is the agent of the others, so as to bind them by his several contracts (*z*).

Co-administrators.

A distinction was taken by Lord Hardwicke in *Hudson v. Hudson* (*a*), between the power of one of several administrators, and one of several executors, with reference to the latter arising wholly from the testator, and the former wholly from the Ordinary: And his Lordship laid down, on the authority of Lord Bacon (*b*), that as an administration was in the nature of an office, so if granted to several, they must

(*x*) *Nation v. Tozer*, 1 Crompt. M. & R. 172.

(*y*) *Post*, Pt. IV. Bk. II. § II.

(*z*) *Turner v. Hardey*, 9 M. & W. 770. This was an action for use and occupation, for a quarter's rent from Lady-day to Midsummer, 1841, to which the defendant pleaded that by an agreement made between the plaintiffs, executors of T., and the defendant, the defendant agreed to take of the plaintiffs, executors as aforesaid, the premises in question; and that it was afterwards agreed between them and W., that W. should become tenant of the plaintiffs from Lady-day, 1841, and that the de-

fendant should be discharged from all liability to subsequent rent, and that the defendant accordingly gave up possession to W., and the plaintiffs accepted him as tenant: and it was held, that this plea was not proved by evidence that one of the plaintiffs had so agreed to accept W. as tenant in lieu of the defendant. But this case must not be understood as deciding that one of several executors may not alone accept a surrender of a term, the reversion of which belongs to them as executors. See *ibid.* 773, per Parke, B.

(*a*) 1 Atk. 460.

(*b*) *Elements*, vol. iv. p. 83.

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Atk. 460.

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join in executing the acts of their office (c); and, therefore,
the release of one would not bind the others, as in the case
of co-executors. But in the subsequent case of *Willand v.*
Fenn (d), it was held in the King's Bench, after three argu-
ments, that one of several administrators stands on the same
ground and foundation with one of several executors. And
this decision was recognised by Sir John Strange, M.R., in
Jacomb v. Harwood (e).

The power of an executor is not determined by the death
of his co-executor, but survives to him (f). And so likewise,
if administration has been granted to two, and one dies, the
other will be sole administrator, and all the power of the
office will survive to him (g).

The ordinary functions incident to the office of executor
may be exercised by one of several appointed executors,
although the others renounce: Yet at common law, where a
power was given by Will to executors to sell land, and one of
them refused the trust, it was clear that the others could not
sell (h). But the statute 21 Hen. VIII. c. 4, provides, that
where lands are willed to be sold by executors, and part of
them refuse to be executors, and to accept the adminis-
tration of the Will, all sales by the executors that accept
such administration shall be as valid as if all the executors
had joined. The terms of the statute are, that where part
of the executors named in a Will, declaring lands, tenements

Survivor of
several ex-
ecutors or
administrators.

Exercise of
power given
to several
executors to
sell land:

when one
of them
renounces:

(c) See also *In the goods of*
Naylor, 2 Robert. 409. *Ante*, p.
354.

(d) Cited by Sir John Strange,
M. R., in 2 Ves. Sen. 267. See a
MS. report of the case in Selw.
N. P. 767, note (8), 6th edition.

(e) 2 Ves. Sen. 267, 268. See
also Touchst. 485, 486. *Smith v.*
Everett, 27 Beav. 454, *per Romilly*,
M. R. However, Sir John Nicholl,
seems, on more than one occasion,
to have adverted to the distinction
as still existing: See *Warwick v.*

Greville, 1 Phillim. 126. *Stanley*
v. Bernes, 1 Hagg. 222. It has
been held in America that a note
executed by an intestate may be
transferred by one of several ad-
ministrators: *Sanders v. Blain*, 6
J. J. Marsh. 446: 22 Amer. Dec.
86. *Murray v. Blatchford*, 1 Wind.
583; 19 Amer. Dec. 537.

(f) *Flanders v. Clarke*, 3 Atk.
509.

(g) *Hudson v. Hudson*, Cas.
temp. Talb. 127. *Ante*, p. 411.

(h) *Co. Litt.* 113, a.



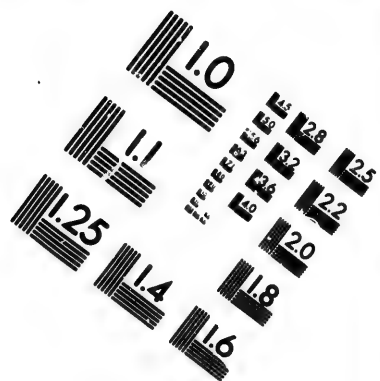
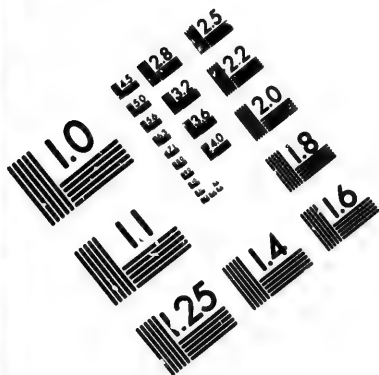
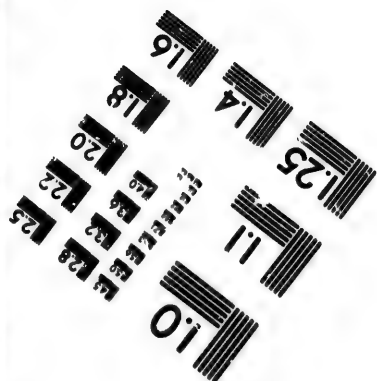
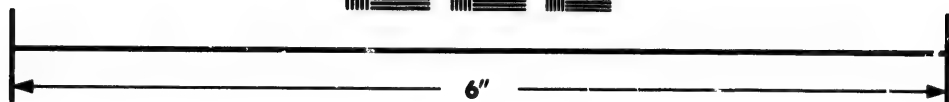
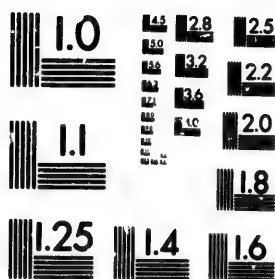


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or hereditaments to be sold by executors, "do refuse to take upon him or them the administration and charge of the same testament and last Will, wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last Will, that then all bargains and sales of such lands, tenements or other hereditaments so willed to be sold by the executors of any such testator, as well heretofore made, as hereafter to be made by him or them only of the said executors, that so doth accept, or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such Will or testament, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in making of the bargain and sale of such lands, tenements or other hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare any such Will of any such lands, tenements or other hereditaments, after his decease, to be sold by his executors." Upon this statute, Lord Coke observes (i) that although the letter of it extend only to cases where executors have a power to sell, yet being a beneficial law, it is by construction extended to cases where lands are devised to executors to be sold (j). It has also been held that the statute extends to copyholds (k).

In the case of *Denne v. Judge* (l), a testator devised land to five trustees to sell and apply the money to certain uses, and afterwards made the same persons executors; the question was, whether the land passed under deeds of lease and release, purporting to have been executed by all the five trustees, but in fact executed by three of them only; and it was urged that the case was within the above statute

(i) Co. Litt. 113, a.

De G. & Sm. 230.

(j) See *ante*, p. 574.

(l) 11 East, 288.

(k) *Peppercorn v. Wayman*, 5

"do refuse to take and charge of the same executors do charge of the same bargains and sales of the same so willed to the testator, as well hereby him or them only, or that heretofore them any such cure Will or testament, the law as if all the said testament, same testament, had the bargain and sale ditaments so willed such testator, which that hereafter shall such lands, tenements, to be sold by his Coke observes (i) that cases where executors official law, it is by lands are devised to been held that the

testator devised land they to certain uses, executors; the question deeds of lease executed by all the three of them only; the above statute

230.
t, 288,

of 21 Hen. VIII. c. 4: But Lord Ellenborough said, that the statute was passed to remedy the inconvenience where some of the executors refuse to act; but in the present case there was no such refusal: Besides, the estate was not devised to them as executors, to be sold, but as devisees, though they were also appointed executors: They had nothing to do with the land as executors (m).

If, however, the fund, when raised, had been distributable by them in that character, it would have been otherwise, as far as respects the latter objection to the application of the statute. Thus in *Bonifaut v. Greenfield* (n), where the testator devised land to four persons and their heirs to sell, and apply the money to the performance of the Will, and, in the conclusion of the Will he appointed the four his executors, it was held, that, on the refusal of one of them to act, a sale by the other three was good.

It is said by Lord Coke (o), that although one executor refuses, the others cannot sell to him, because he is a party and privy to the Will, and remains executor still. But that position must now be considered as overruled by the decision of the Court of Common Pleas, in *Mackintosh v. Barber* (p): In which case it was further decided, that executors to whom a power is given to sell may, at law, sell to a trustee for themselves, or may sell to one of themselves; and an appointment accordingly cannot be impeached at law. Whether such an appointment can be supported in equity, must depend upon the circumstances under which the sale was made (q).

In the case of *Granville v. M'Neile* (r), where a power, contained in a deed of settlement of real estate, enabled one

Exercise of power to appoint a new

(m) But taking the conveyance to be by the three trustees only, it severed the joint-tenancy, and conveyed three-fifths of the estate to be held in common with the two remaining parts.

(n) Cro. Eliz. 80.

(o) Co. Lit. 113, a.

(p) 1 Bingh. 50.

(q) 1 Sugd. on Pow., 141, 6th ed. And now in this case, as in all cases in which there formerly was any variance between the rules of equity and common law, it seems that the rules of equity will prevail. Jud. Act, 1873, s. 25, sub-s. 1i.

(r) 7 Hare, 156.

trustee, given to a man, and his executors, when he is dead and one of his executors renounces:

of the parties, his executors, administrators and assigns, on a vacancy to appoint a new trustee, and the party so empowered died, having by his Will named three executors, one of whom renounced probate, it was held by Wigram, V.-C., that a vacancy in the trust having occurred, the two acting executors had power to appoint the new trustee: And his Honor said that, in all such cases, the question is, whether the confidence is reposed in the individuals named or in the persons who, *de facto*, fill the given office: and that, in the present case, the intention plainly was, that those whom the party, empowered in the first instance, trusted to administer his property, should also be entrusted to exercise the power given to him in the settlement; and that those whom he trusted were the persons who acted, and not those only whom he named.

exercise of power by surviving executors:

Again, it has appeared that if one of two executors dies, the office survives to his co-executor (s). But it is necessary further to enquire, whether, if a power is given to several executors, and one of them dies, the power can be exercised by the survivors or survivor. It is regularly true at common law, that a naked authority given to several cannot survive (t). Therefore, if a man devise his lands to A. for life, and that after his decease the estate shall be sold by the executors, naming them, as by B. and C. his executors, or by B. and . . . who are not named executors, in that case, if one of them die during the life of A., the other cannot sell; because the words of the testator would not be satisfied (u). But where this can be effected, a Court of law will relax the rule. Therefore, if three or more executors are appointed, and the devise is, that the estate shall be sold by the executors generally, there the survivors may sell because the plural number of executors remains (v).

by a single survivor.

Again, although the authorities are conflicting (x), there

(s) *Ante*, p. 821.

(t) 1 Sugd. Pow. 141, 6th edit.

(u) Co. Lit. 113, a. 1 Sugd. Pow. 141, 6th edit.

(v) Co. Lit. 113, a. 1 Sugd.

Pow. 142, 6th edit.

(x) See a case in Dyer, 219, pl. 8, in *margin*. Lock v. Loggin, 1 And. 145.

a case in Dyer, 219, pl.
rine. Lock v. Loggin, 1

(c) 16 Beav. 231.

they are also appointed executors, to ascertain whether the power is given to the executor or to the [person : In the present case, the learned judge looking at the words used by the testator, both in the passage which conferred the power and in other parts of the Will, was of opinion that the power was given to the two executors *nominatim*, and not in their executorial capacity. But the Lords Justices, on appeal (*d*), dissented from this opinion.

And now by section 38 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), where a power or trust is given to, or vested in, two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument (if any) creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. This provision, however, applies only to executorships and trusts constituted after, or created by instruments coming into operation on or after, 1st Jan. 1882.

Executors must all join in bringing actions.

If there are several executors appointed by the Will, they must all join in bringing actions (*e*); even though some be infants (*f*).

Where, however, one executor of several has alone proved the will, he may sue without making the other executors parties, although they have not renounced (*g*). If one of several executors who have all proved the will sue alone, the defendant may apply to the Court for an order that the other executor or executors may be joined as co-plaintiffs (*h*).

(*d*) 4 De G. M. & G. 528.

(*e*) Bro. Exors. 88.

(*f*) *Smith v. Smith*, Yelv. 130. As to one of several executors making a summary application to the court, see *Re Bunting*, 2 A. & E. 467.

(*g*) D. C. P. 6th ed. 224.

(*h*) R. S. C. 1883, Ord. XVI. r. 11. This procedure is substituted for the plea in abatement and demurrer for want of parties

existing prior to the Judicature Act. It is of course subject to the same rules with respect to showing that the party whose joinder is claimed is alive and within the jurisdiction as were in force with regard to the old plea, and the necessary facts should now be shown by affidavit in support of the application. And further by Ord. XVI. r. 11, the consent of the person added as plaintiff must be

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Generally speaking, it is clear that one executor cannot
sue or be sued by his co-executor (i) : neither, after the
death of one of several executors, can his executor be sued
by the surviving co-executor for a debt due to their testa-
tor (k). Nevertheless, if a debtor makes his creditor and
another his executors, and the creditor neither proves the
Will nor acts as executor, he may bring an action against
the other executor (l) : nor is it necessary to enable him so
to do, that he should renounce in the Court of Probate (m).

In a case where the survivor of two executors, who had
taken out administration to the other, filed a bill to set aside a
mortgage of part of the assets made by the deceased executor
as having been a breach of trust, it was held that the fact of
the plaintiff having taken out the administration did not dis-
qualify him from maintaining the suit (n).

In *Gleadow v. Atkin* (o) an action of debt, on a common
money bond, was brought by the executor of the obligee
against the executors of the obligor : And it was held by the
Court of Exchequer, on general demurrer, that the loan by
one of the executors to the other was a misappropriation of
the fund, of which the executor of the obligee was liable until
the money was laid out on real and sufficient security ; and
consequently that he had a right to sue on the bond to
protect himself.

Where there are several executors, they may agree that
one of them shall hold the land devised to them in trust
at a fixed rent, and if the rent falls into arrear, he may be
distrained upon in respect of it (p). If, however, executors,

When one exe-
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the other :

on bond given
as a security
on loan of as-
sets by one to
the other.

Demise by
executors to
their co-
executor.

obtained, unless he is under dis-
ability. Chitty's Archbold, 14th
ed. 1019, 1020.

(i) Wentw. Off. Ex. 75, 14th
ed. Ante, p. 786. See also *post*,
Pt. v. Bk. I. Ch. II.

(k) Wentw. Off. Ex. 75, 14th
ed. Ante.

(l) *Dorchester v. Webb*, W.
Jones, 345.

(m) *Rawlinson v. Shaw*, 3 T. R.
557.

(n) *Miles v. Durnford*, 2 De G.
M. & G. 641, by the Lords Jus-
tices, overruling the decision of
Kindersley, V.-C., 2 Sim. N. S.
234.

(o) 2 *Crompt. & Jerv.* 548.

(p) *Cowper v. Fletcher*, 34 L. J.
(N. S.) Q. B. 187.

having been directed by the will to sell the real estate, allow one of their number to hold stores and buildings at less than a fair occupation rent, they are chargeable with what would have been a fair occupation rent (q).

(q) *De Cordova v. De Cordova*, 4 App. Cas. 692.

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CHAPTER THE THIRD.

OF THE POWER AND AUTHORITY OF AN EXECUTOR OF AN EXECUTOR :—OF AN ADMINISTRATOR DE BONIS NON : AND OF A LIMITED ADMINISTRATOR.

AS to the power and authority of the executor of an executor : In all cases, except of special trust and authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having and doing, in the same state and plight as the first and immediate executor (*a*).

Executor of
executor :

“But where, by a Will,” says the author of the Office of an Executor (*b*), “a special trust is recommended to an executor, as to sell land, this not performed in his lifetime shall not be performable by his executor: contrariwise of an interest, as to take the profits of lands for certain years towards payment of debts and legacies” (*c*). In the case of *Cole v. Wade* (*d*), real and personal estate were by Will given to two trustees, who were appointed executors, their executors, administrators, and assigns for the benefit of such relations of the testator as the trustees and executors in their discretion should think proper: And it was declared that the disposition should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them; and the testator gave power to his trustees and executors, and the survivor of them, and the heirs, executors, and administrators of such survivor, to sell or mortgage the estates; and the trustees (by name), or the survivor of them, or the heirs, executors

when he can
execute a
power :

(*a*) Wentw. Off. Ex. c. 20, p. 462, 14th edit.

(*b*) C. 20, p. 462, 14th edit.

(*c*) See also as to this dis-

inction between an interest and an authority only, *Style v. Tomson*, Dyer, 210, *a*.

(*d*) 16 Ves. 27.

or administrators of such survivor, were to convey and pay the whole of the relations within fifteen years: The surviving trustee, by his Will, devised the first testator's real estate to A. & B., their heirs and assigns, and his personal estate to them, their executors, administrators, and assigns, upon the trusts of the first Will, and appointed them his trustees for that specific purpose only: and it was contended, that they might execute the power: The Master of the Rolls (Sir W. Grant), decided the contrary: he said, that wherever a power is of a kind that indicates a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom, by legal transmission, the same character may happen to belong: The power was not appendant to the estate; by itself it was incapable of alienation: and it was only *quasi personæ designatæ* that it could go to the heir: The devisees did not answer that description: The power, therefore, was not vested in them (e).

With respect, however, to a power to sell land, Hargrave, in a note to Coke upon Littleton (f), cites some authorities (g) to show that such a power given to the executors shall pass to their executors or administrators (h). Again, it has appeared in a former part of this Treatise, that a

(e) 1 Sugd. Pow. 148, 6th edit. This opinion of Sir W. Grant was approved of by Lord Eldon, in *Walter v. Maunde*, 19 Ves. 425. See further on the question whether the executor of an executor, or the devisee of a trustee, can execute a power or trust originally conferred on his testator, or whether it is a personal confidence which is not transmissible with the office or estate, *Down v. Worrall*, 1 M. & K. 561. *Cooke v. Crawford*, 13 Sim. 91. *Titley v. Wolstenholme*, 7 Beav. 425, 433, which

in principle overruled *Cooke v. Crawford*. See *Osborne to Rowlett*, 13 C. D. 774, 786, *per* Jessel, M.R. *Mortimer v. Ireland*, 6 Hare, 196. *Wilson v. Bennett*, 5 De G. & Sm. 475. *Macdonald v. Walker*, 14 Beav. 556. *Re Burt*, 1 Drewr. 319. *Forbes v. Forbes*, 18 Beav. 552. *Saloway v. Strawbridge*, 1 Kay & J. 371. *Hall v. May*, 3 Kay & J. 590.

(f) 113, a.

(g) *Kelw.* 44. 2 Brownl. 194.

(h) See also the cases collected *supra*, note (e).

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Wilson v. Bennett, 5
Sm. 475. Macdonald v.
4 Beav. 556. *Re Burtt*,
319. Forbes v. Forbes,
552. Saloway v. Straw-
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, a.
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also the cases collected
e (*e*).

power in a Will to sell or mortgage, without naming a
donee, will, unless a contrary intention appear, vest in the
executor, if the fund is to be disributable by him (*i*): And
it seems, that in such case, the executor of the executor may
sell, the intent being, that the power shall be executed by
him to whose hands the money is to come (*k*).

Where a power is annexed to an interest in the donee,
and is originally authorised to be executed by the donee of
the power and his assigns, the power will pass with the
interest to any person who comes to the estate under him,
although there be twenty mesne assignments; and whether
the claimant is an assignee in fact, or an assignee in law, as
an heir or executor (*l*). In a case where, upon a fine, the
use of lands was limited to A. for eighty years, with a power
to A. and his assigns to make leases for lives; and A.
assigned over to B., who died, and made C. his executor, and
then the executor assigned over to D.; it was holden, that
D. might well exercise the power (*m*).

a power an-
nexed to an
interest.

With regard to the power and authority of an adminis-
trator *de bonis non*; By the grant of that species of admini-
stration, the administrator becomes the only personal
representative of the original deceased: and, with respect to
the estate left unadministered by the former executor or
administrator, he has the same power and authority as the
original representative; for he succeeds to all the legal rights
which belonged to the former executor or administrator in his
representative character (*n*).

Power of ad-
ministrator *de*
bonis non

With regard to the power and authority of limited and of
special administrators, it is difficult to lay down any general
proposition: and little more can be done than to refer to

Power of
limited and of
special ad-
ministrators.

(i) *Ante*, p. 575. See also Tyl-
den v. Hyde, 2 Sim. & Stu. 238.

(k) 1 Sugd. Pow. 134, 6th edit.
1 Pow. Dev. 243, Jarman's edit.

(l) 1 Sugd. Pow. 223, 6th edit.

(m) *Howe v. Whitebank*, 1
Freem. 476.

(n) *Catherwood v. Chabaud*, 1
B. & C. 154, by Bayley, J. See
ante, p. 792, *et seq.*

the authorities upon the subject which have already been adduced, in treating of the constitution of these several kinds of administration, with respect to the power of an administrator appointed as the attorney of the party entitled *durante absentia* (o), of an administrator *durante minore ætate* (p), of an administrator *pendente lite* (q), and of an administrator limited to substantiate proceedings in equity (r).

It is enacted by statute 38 Geo. III. c. 87, s. 7, that the person to whom administration *durante absentia* (s) shall be granted under the provisions of the Act, shall have the same powers vested in him as an administrator hath by virtue of an administration granted to him *durante minore ætate* of the next of kin.

(o) See *ante*, pp. 436, 437.

(p) *Ante*, p. 423, *et seq.*

(q) *Ante*, p. 430.

(r) *Ante*, p. 446.

(s) See *ante*, p. 434.

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 him *durante minore*

, p. 446.
 ante, p. 434.

CHAPTER THE FOURTH.

OF THE POWER OF A FEME COVERT EXECUTRIX OR ADMINISTRATRIX.

SINCE the commencement of the Married Women's Property Act, 1882, a married woman may be, and act as, executrix or administratrix of a deceased person as if she were a feme sole, without the consent or control of her husband. This power is given to her by sections 1 (2) and 24 of the Act, which provide: 1 (2) that "A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued either in contract, or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by, or taken against, her."

And 24, that "The word 'contract' in this Act shall include the acceptance of any trust or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration."

And by section 18 of the same Act power is given to a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, to sue or be sued, and transfer, or join in transferring annuities, stocks, shares, debentures, &c.,

Capability of a married woman to be an executrix or administratrix:

provisions of the Married Women's Property Act, 1882, with respect to such capability of married women.

The law on
this subject
prior to the
Married
Women's Pro-
perty Act, 1882.

without her husband as if she were a *feme sole*. This enactment supersedes the old law by which a married woman could not take upon herself the office of executrix or administratrix without the consent of her husband. By that law, since the husband was answerable for the wife's acts, she was not capable, though she had by his permission assumed the office of executrix or administratrix, of doing any act of administration to the deceased which might have been to the prejudice of her husband, without his concurrence. The reason for this is now at an end, since by the Act as above stated, a husband is not subject to the liabilities incurred by the wife by reason of any breach of trust or *devastavit* either before or after her marriage, unless he has himself acted or intermeddled in the trust or administration. It also follows that since the Act, as he is no longer under any liability for his wife's breach of trust or *devastavit* as above stated, a husband has no longer any power of disposition over the personal estate vested in his wife as executrix or administratrix, inasmuch as such power of disposition which he had prior to the Act, was given to him for the purpose of administering in his wife's right for his own safety.

A married
woman suing
without her
husband being
joined not
liable to give
security for
costs.

A married woman suing as plaintiff without her husband being joined since the Married Women's Property Act, 1882, is not liable to give security for costs (a).

The law on the subject of the power of a *feme covert* as executrix or administratrix, and the power of the husband of such executrix or administratrix, as it existed prior to the Married Women's Property Act, 1882, is stated and discussed with the authorities bearing upon it in the former editions of this Work, Pt. III. Bk. I. Chap. IV.

(a) *Threlfall v. Wilson*, 8 P. D. 18.

BOOK THE SECOND.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR, WITH
RESPECT TO THE FUNERAL: THE PROVING OF THE WILL
AND THE TAKING OUT ADMINISTRATION: THE INVENTORY
AND THE PAYMENT OF DEBTS.

CHAPTER THE FIRST.

OF THE FUNERAL: OF PROVING THE WILL, AND TAKING OUT
ADMINISTRATION: AND OF THE INVENTORY.

SECTION I.

Of the Funeral.

IT is now proposed to consider the Duties of an executor or administrator. And first: He must *bury* the deceased in a manner suitable to the estate he leaves behind him (*a*).

(*a*) 2 Black. Comm. 508. The executors are entitled to the possession, and are responsible for the burial, of a dead body. There is no property in a dead body, and a direction by will as to the disposition of the testator's body cannot be enforced: *Williams v. Williams*, 20 C. D. 659. In that case, Kay, J., doubted whether the burning of a body is lawful. A point was decided by Stephen, J., in *Reg. v. Price*, 13 Q. B. D. 247, where it was held that it is no misdemeanour to burn a dead body instead of

burying it, unless it is burnt in such a way as to amount to a public nuisance. It would seem from the above decision, which establishes the legality of cremation, that an executor who cremates the dead body of his testator either in accordance with directions contained in the will or in the exercise of his own discretion, is entitled to be paid the reasonable expenses of so doing, in the same manner as he would be entitled to be paid the expenses of burial.

What expenses
are allowable
as against
creditors :

Funeral expenses, says Lord Coke (b), according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever. But the executor or administrator is not justified in incurring such as are extravagant, even as it respects legatees or next of kin entitled in distribution (c) : Nor, as against creditors, shall he be warranted in more than are absolutely necessary. In strictness, said Lord Holt, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk, and bearers : but not for the pall or ornaments (d). And in the year 1695, it was stated that Baron Powel on his circuit would allow but 11s. 6d. under a plea of *plene administravit* ; which he said was all the necessary charge (e). However, it appears that Lord Holt, where under that plea, 150l. was charged for the testator's funeral, said that at least

(b) 3 Inst. 202. In the case of persons dying domiciled in any part of the United Kingdom on and after 1st June, 1888, the executor or administrator has power to deduct debts and funeral expenses from the value of the estate and effects as specified in the account delivered by him. The funeral expenses to be deducted "*shall include only such expenses as are allowable as reasonable funeral expenses according to law.*" 44 Vict. c. 12, s. 28.

"It seems clear that expenses not directly relating to the funeral, such as for embalming the body of the deceased and bringing it home from abroad for burial in this country, or for putting his family and servants into mourning, or for erecting a monument to his memory, are not a proper deduction under this section, al-

though if an executor has incurred them under the directions in the will he may be entitled to retain them out of the estate as against the creditors." Hanson's Revenue Acts, 1880 and 1881, p. 31.

(c) See *Stackpoole v. Stackpoole*, 4 Dow. 227. A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral though such estate is insufficient for creditors and her will does not contain any charge for debts and funeral expenses : *Re M'Myn*, 33 C. D. 575.

(d) *Shelly's case*, 1 Salk. 296. Perhaps, observes Dr. Burn, the expenses of the shroud and digging the grave ought to have been added : 4 Burn, E. L. 348, 8th edit.

(e) *Anon. Comberb.* 342.

according to the be allowed of the duty whatsoever. justified in incur- respects legatees or Nor, as against than are absolutely t, no funeral ex- vent estate, except fees of the parson, or ornaments (d). Baron Powel on er a plea of *plene* necessary charge (e). e under that plea, t, said that at least

an executor has incurred the directions in the y be entitled to retain the estate as against s." Hanson's Revenue and 1881, p. 31.

Stackpoole v. Stackpoole, A husband, executor's will made under a y power of appoint- tilled to retain out of the expenses of her ough such estate is in- r creditors and her will contain any charge for funeral expenses: *Re* C. D. 575.

y's case, 1 Salk. 296, observes Dr. Burn, the of the shroud and dig- ave ought to have been Burn, E. L. 348, 8th

. Comberb. 342.

140l. ought to be deducted; for 10l. is enough to be allowed for the funeral of one in debt (f).

Lord Hardwicke in *Stag v. Punter* (g), upon exceptions to a Master's report for not allowing 60l. for the testator's funeral, said, "At law, where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40s., then 5l., and at last 10l. (h). I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts: But this Court is not bound down by such strict rules, especially when a testator leaves great sums in legacies which is a reasonable ground for an executor to believe the estate is solvent: As this is the case here, I am of opinion that sixty pounds is not too much for the funeral expenses, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death."

In *Hancock v. Podmore* (i), issue was taken, in an action, by a creditor against an executor, on a plea of *plene administravit*, and it was proved that assets to the amount of 129l. had come to the hands of the defendant, and that he had paid 55l. for probate duty, and 79l. for funeral expenses: The deceased had been a captain in the army, and the question was, whether the defendant could, as against a creditor, apply so large a sum as 79l. to such a purpose: The Court of King's Bench was of opinion that the sum was too great to be allowed: But Mr. Justice Bayley, in delivering the judgment of the Court, observed, that although the rule is, that, as against a creditor, no more shall be allowed for a funeral than is necessary, yet in considering what is necessary, regard must undoubtedly be had to the degree and condition

(f) *Ibid.*

(g) 3 Atk. 119.

(h) But in Buller's N. P. 143, it is said that the usual method is to allow five pounds: and in Selwyn's N. P. 776, n. 18, 6th edit.,

a MS. case of *Smith v. Davies*, Middlesex Sittings after M. T. 10 Geo. II., is mentioned, where this latter sum was allowed by Lord Hardwicke himself.

(i) 1 B. & Ad. 260.

in life of the party; and his Lordship observed that the sum of 10*l.*, mentioned by Lord Hardwicke as the established allowance in his time, might perhaps, at the present day, be less than what should be reasonably allowed for a person of condition: The learned Judge proceeded to intimate, that the Court thought 20*l.* would be a proper sum for the funeral of a person in the degree and consideration of life of this testator (*k*).

It must not, however, be understood that the Court, in *Hancock v. Podmore*, laid it down as a rule, that even the sum of 20*l.* should be the limit of the allowance, where the estate is insolvent; but that it was the proper limit under the circumstances of that case: The rule appears to be, that the executor is entitled to be allowed reasonable expenses, according to the testator's condition in life; and if he exceeds those, he is to take the chance of the estate turning out insolvent: No precise sum can be fixed to govern executors in all cases: It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place (*l*).

In *Bissett v. Antrobus* (*m*), Sir L. Shadwell, V.C., refused to allow 2,210*l.* for the funeral expenses of a deceased nobleman, whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent: And his Honor referred it to the Master to inquire and state what sum ought to be allowed.

as against
legatees, &c.

With respect to allowances for funeral expenses, where there are assets sufficient, as against other persons than creditors: In *Offley v. Offley* (*n*), there had been 600*l.* laid out in Mr. Offley's funeral and the Court decreed that sum to be a debt to affect the trust estate, Mr. Offley being a man

(*k*) See *Yardley v. Arnold*, & M. 612. See also *Reeves v. Carr*, & M. 434, 438, *per* Parke, B. Ward, 2 Scott, 395.

Accord.

(*m*) 4 Sim. 512.

(*l*) *Edwards v. Edwards*, 2 Cr.

(*n*) *Prec. Chan.* 26.

[Pt. III. Bk. II.]

served that the sum as the established the present day, be owed for a person of d to intimate, that sum for the funeral tion of life of this

that the Court, in rule, that even the allowance, where the proper limit under e appears to be, that easonable expenses, e; and if he exceeds estate turning out to govern executors every instance, not ticular testator, but es at the particular

adwell, V.C., refused of a deceased noble- t to be solvent at his rcumstances, proved it to the Master to allowed.

ral expenses, where other persons than had been 600*l.* laid t decreed that sum r. Offley being a man

2. See also Reeves v. cott, 395. ini. 512. e. Chan. 26.

of great estate and reputation in his county, and being buried there: but if he had been buried elsewhere, it seemed his funeral might have been more private, and the Court would not have allowed so much (o).

In *Paice v. The Archbishop of Canterbury* (p), a payment of 93*l.* 12*s.* 6*d.* for mourning rings distributed among the relations and friends of the deceased, was allowed by Lord Eldon to the executors: The Will had not given any directions on the subject, but committed "any thing not specified" to the discretion of the executors (q).

In *Mullick v. Mullick* (r), on an appeal to the Privy Council from an order of the Supreme Court of Bengal, it was held, with respect to the expenses of the funeral obsequies of a Hindoo testator, that, as the Will gave no directions how they were to be performed, the only question to be considered was, whether the sums allowed for their performance were more than had usually been expended at the funerals of persons of the same rank and fortune as the deceased.

The question of the liability of an executor or administrator, for the expenses of the funeral of the deceased, will be considered in a subsequent part of this Treatise (s).

Liability of executor for funeral expenses.

(o) See *Stackpoole v. Stackpoole*, 4 Dow. 227. *Bridge v. Brown*, 2 Y. & Coll. C. C. 181.

(p) 14 Ves. 364.

(q) In *Johnson v. Baker*, 2 Carr. & Payne, 207, Best, C. J., held that a demand for mourning, furnished to the widow and family of the testator, is not a funeral expense, such as can be claimed against the estate by the executor, if he gives the order for it and, consequently, that a legatee, who had not received his legacy, was a competent witness, under the old

law, on behalf of the executor in an action brought against him for the recovery of such demand. See also *Bridge v. Brown*, 2 Y. & Coll. C. C. 181, 186, as to the expense of erecting a tombstone. In *Pitt v. Pitt*, 2 Cas. temp. Lee, 508, Sir G. Lee allowed a widow for her mourning, in her account, as administratrix, in the Ecclesiastical Court.

(r) 1 Knapp, 245.

(s) *Post*, Pt. IV. Bk. II. Ch. II. § 1.

SECTION II.

Of Proving the Will and taking out Administration.

55 Geo. III. c. 184. Penalty for not proving Wills or taking letters of administration, within a given time.

By stat. 55 Geo. III. c. 184, s. 37, it is enacted, "that if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months after the determination of any suit or dispute respecting the Will, or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased." [See also stat. 28 & 29 Vict. c. 104, s. 57, *ante*, p. 538.]

Power of an executor to compel production of testamentary papers.

The power of an executor to compel the production of Wills and other testamentary papers, for the purposes of probate, and the mode of doing so, when the instruments happen to be in the custody of other persons, have been pointed out in a previous part of this work (*t*).

SECTION III.

Of the making of an Inventory by the Executor or Administrator.

The statute 21 Hen. VIII. c. 5, provides for the making of inventories by executors and administrators of all the goods, chattels, wares, merchandises as well moveable as not moveable whatsoever that were of the deceased, and by stat. 22 & 23 Car. II., c. 10, s. 1, an administrator must have entered into a bond conditioned amongst other things for his ex-

(*t*) *Ante*, p. 258, *et seq.*

Administration.

is enacted, "that if and in any manner the goods and effects of any testator or of the Will or of the goods and effects of the testator or her decease, or of the determination of any right to letters of administration, which shall not be made before the death of the testator, shall forfeit the sum of ten pounds, at and after the death of the testator, the amount of the stamp duty on the letters of administration, or of the sum of ten pounds, whichever shall be the least." [See also *ante*, p. 538.]

The production of Wills for the purposes of probate, and of the instruments which happen to be pointed out in

The Executor or

provides for the making of inventories of all the goods, moveable as not moveable, and by stat. 22 & 23, an executor or administrator must have entered an inventory of the things for his ex-

hibiting into the Registry of the Court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession (*u*). The bond given under the Court of Probate Act is conditioned to make the inventory when lawfully called on, and to exhibit the same whenever required by law so to do (*v*).

The Ancient Ecclesiastical Law was very strict with respect to the making of inventories (*x*); and it will be observed, that that statute required executors or administrators to exhibit inventories, as part of their duty, without any proceeding to call upon them to do so (*y*). The old practice of the Prerogative Court of Canterbury was to require an inventory to be exhibited *before* probate was granted; and this continued prevalent in some country jurisdictions (*z*).

And according to the modern practice, neither the executor nor administrator, in general cases, exhibits any inventory whatsoever, unless he be cited for that purpose in the Spiritual Court, at the instance of a party interested (*a*). But,

In what cases and by whom the exhibiting an inventory is compellable.

(*u*) As to the account of particulars of personal estate, required with the affidavit from the person applying for probate or letters of administration in England, see 43 Vict. c. 14, s. 10, *ante*, p. 503.

(*v*) See Probate Rules and Orders, Form XVI.

(*x*) See Swinb. Pt. 6, s. 6 s. 8, s. 9: and the consequence of neglecting to make one, seems to have been to prevent the executor from relying on want of assets: See *Ibid.* Pt. 3, s. 17, pl. 8. Even the temporal Courts formerly considered the neglect of this duty in a light unfavourable to the party, especially where there was a deficiency of assets; and although not conclusive on him, yet exposing him to imputation: *Orr v. Kaines*, 2 Ves. Sen. 193.

(*y*) An administrator who neglected to exhibit his inventory by

the time specified in the bond given under the statute of Car. II. thereby incurred a breach of the condition without any citation. See *Ritchie v. Rees*, 1 Add. 152. *Secus*, as to the bond given under the Court of Probate Act. In the goods of Jones, 3 Sw. & Tr. 28. *Baker v. Brooks*, 15. 32.

(*z*) *Phillips v. Bignell*, 1 Phil. 240, by Sir John Nicholl.

(*a*) *Phillips v. Bignell*, 1 Phil. 240. Toller 250. However, the Court may, in some instances, require *ex officio*, that an inventory shall be exhibited: 1 Phillim. 240. In the goods of Williams, 3 Hagg. 217. *Acaster v. Anderson*, 1 Robert. 674. And in order to exonerate himself from all liability, it is always most prudent for the executor or administrator to exhibit it before a final settlement: *Kenny v. Jackson*, 1 Hagg. 106.

although inventories are not now required in practice to be exhibited without being so called for, yet still an executor or administrator is compellable to exhibit one at the prayer of any person having an interest, or even the *appearance* of an interest (b). Thus, the personal representative of the residuary legatee of him who was the residuary legatee of the original testator has sufficient interest for the purpose of calling on his personal representative to exhibit an inventory (c). Again, it has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for an inventory and account (d).

Thus, if a creditor swears to certain sums due from the deceased to him, it is enough to entitle him to an inventory, though the debt be contested (e). So where the assignees of a bankrupt made an affidavit of a debt due from the deceased to the bankrupt, the administrator was assigned to exhibit an inventory, notwithstanding the Statute of Limitations had run out since the administration was granted (f).

So the Court will compel an executor to bring in an inventory, &c., at the suit of a creditor by a bond of the testator, notwithstanding its alleged invalidity; and though a suit is actually commenced on the bond, and then depending at common law (g). And the Court will not notice the

(b) *Phillips v. Bignell*, 1 Phil. 241. *Gale v. Luttrell*, 2 Add. 236.

(c) *Winchlow v. Smith*, 1 Cas. temp. Lee, 417.

(d) *Salter v. Sladen*, Prerog. M. T. 1792. *Snow v. Strutt*, Prerog. H. T. 1793, cited 1 Phil. 241, *per curiam*. *Myddleton v. Rushout*, 1 Phil. 244. *Reeves v. Freeling*, 2 Phil. 57. *Burgess v. Marriott*, 3 Curt. 424.

(e) *Smith v. Price*, 1 Cas. temp. Lee, 569. *Hackman v. Black*, 2 Cas. temp. Lee, 251.

(f) *Phillipson v. Harvey*, 2 Cas. temp. Lee, 344. See also *Wainford v. Barker*, 1 Ld. Raym. 232.

(g) *Gale v. Luttrell*, 2 Add. 234. See also *Oughton*, tit. 240, s. 9, 10. Accordingly, an inventory and account was ordered on the application of a party, who, twenty-four years after the death of the testator, had commenced an action against his executors on a covenant by him by way of guarantee, the object of the applicant being to ascertain, whether there were any assets before he

ed in practice to be still an executor or one at the prayer of the appearance of an representative of the residuary legatee of for the purpose of to exhibit an inven- in a variety of cases, will justify a party in

sums due from the him to an inventory, where the assignees debt due from the trator was assigned ing the Statute of administration was

tor to bring in an r by a bond of the alidity; and though l, and then depend- rt will not notice the

llipson v. Harvey, 2 Cas. 344. See also Wain- ker, 1 Ld. Raym. 232. v. Luttrell, 2 Add. 234. Dughton, tit. 240, s. 9, ordingly, an inventory at was ordered on the of a party, who, r years after the death tor, had commenced anst his executors on a by him by way of the object of the appli- to ascertain, whether e any assets before he

effect of any release which a legatee may have given (*h*). Likewise, an executor who is also residuary legatee may call on his co-executor for an inventory (*i*): and so he may, perhaps, without any special interest (*k*).

But in *Boon's Case* (*l*), where a legacy was to be paid at three several payments, and the executor having made two, and tendered the third, was cited by the legatee to bring in an inventory, it was holden by the Delegates, and also on a Commission of Review, that there was no need of an inventory at his instance. So in *Fleet v. Holmes* (*m*), in a suit for the recovery of a legacy, Sir G. Lee refused to decree an inventory, thinking it useless; because the executrix had in her answers, confessed assets sufficient to cover the legacy, and the interest claimed thereon and the costs of the suit. Again in *Leighton v. Leighton* (*n*), where an executrix, being cited to exhibit an inventory, gave in a declaration *loco inventarii*, in which she declared that the deceased, by a bill of sale, in consideration of a debt due to her had duly granted to her all the personal estate of which he should die possessed, Sir G. Lee held that the declaration was sufficient, and refused to compel an inventory. So where a party showed sufficient interest for calling on the executor to exhibit an inventory, but not to see portions allotted and distribution made, the Court would accept an admission of assets in lieu

incurred further expense: And Sir H. Jenner Fust said it was the duty of the executors, notwithstanding they insisted that the estate of their testator was not liable, either to exhibit an inventory and account, or to admit assets sufficient to answer the demand: *Jickling v. Bircham*, 2 Notes of Cas. 403.

(*h*) *Kenny v. Jackson*, 1 Hagg. 105. See also *Acastor v. Anderson*, 1 Robert. 672.

(*i*) *Paul v. Nettleford*, 2 Add. 237.

(*k*) *Huggins v. Alexander*, Prerog. 1736. 2 Add. 238, note (*a*). There is only one case in which the application of a party having any kind of interest is refused: viz., if a creditor has brought a suit in Chancery for the discovery of assets, the party shall not proceed in both Courts: *Myddleton v. Rushout*, 1 Phil. 247. *Brotherton v. Hellier*, 2 Cas. temp. Lee, 134.

(*l*) Sir T. Raym. 470.

(*m*) 2 Cas. temp. Lee, 101.

(*n*) 2 Cas. temp. Lee, 356.

of an inventory, or any other admission which would enable the Court to exercise a discretion and not to call for an inventory (o).

After what
lapse of time
an inventory
may be com-
pelled.

Although no statute or rule of positive law has fixed any time certain, within which an inventory and account must be sued, and time alone is not to be considered a bar (p), still reason and justice prescribe some limitation: And in cases where there has been a great lapse of time between the death of the party, and the citation calling for the inventory, the Court has frequently refused to enforce the exhibition of an inventory (q). Thus, it was held (r), that the lapse of forty-five years in conjunction with circumstances, afforded a reasonable presumption of the estate having been fully administered; and that therefore the inventory and account might be dispensed with. So where, twenty-four years after the death of the intestate, eleven years after the youngest child attained twenty-one, and seven years after his insolvency, his provisional assignee sued the administratrix for an inventory and account; and it appeared, that shortly after the intestate's death, a valuation and inventory had been made, and facts were shown from which it might be fairly presumed that the insolvent had received more than his share, the Court refused the application (s). So in *Bowles v. Harvey* (t), a party having, after a lapse of thirty-five years, called for an inventory and account of an insolvent estate, the executor, who appeared under protest, was dismissed with costs. Again in *Scurrah v. Scurrah* (u), an application to compel an administratrix to exhibit an inventory after the lapse of eighteen years, was rejected and the applicant, under the circumstances, was condemned in costs. And on another

(o) *Burgess v. Marriott*, 3 Curt. 426.
424.

(p) *Jickling v. Bircham*, 2 Notes
of Cas. 463, stated *ante*, p. 842,
n. (g).

(q) *Burgess v. Marriott*, 3 Curt.

(r) *Ritchie v. Rees*, 1 Add. 144.

(s) *Pitt v. Woodham*, 1 Hagg.
247.

(t) 4 Hagg. 241.

(u) 2 Curt. 919.

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occasion (*x*), in a case of inventory and account brought by a legatee, a declaration (instead of an inventory) setting forth desperate debts due to, and large debts due from the estate, but annexing no vouchers nor accounts, was held sufficient for a lapse of seventeen years: and Sir John Nicholl laid down that in such a suit the Court cannot decide whether debts alleged to be due from the estate are a legal set-off (*y*).

The parties who may be cited to exhibit an inventory and account are not confined to the executor or administrator himself, or even to those who, upon the death of the executor or administrator, succeed to the representation of the original testator or intestate. Thus, in *Ritchie v. Rees* (*z*), Sir John Nicholl held, that the representatives of a deceased administrator *cum testamento annexo*, although not at the same time those of the first testator, were liable to be called on for an inventory and account, upon a reasonable presumption being raised that any part of the effects of the first testator had travelled into their hands (*a*): The learned judge was further of opinion that a party, having an interest in the effects, was entitled to call upon such representatives for the inventory, without first taking a *de bonis non* grant of the effects of the first testator. So the executors of a deceased executor, though not the personal representatives of the original testator (there being an executor of the original testator still surviving), are compellable to bring in an inventory of the effects of the original testator (*b*).

An attorney who takes administration in the name of another may be compelled by the latter to exhibit an inventory and account (*c*). So an administrator *durante mino*. *ante* may

What persons
are compel-
lable to exhibit
an inventory.

(*z*) *Higgins v. Higgins*, 4 Hagg. p. 846, note (*i*).

242.

(*y*) See further, as to the ful-
ness requisite for a declaration,
Leighton v. Leighton, 2 Cas. temp.
Lee, 356. *Akerman v. Gybbon*, 2
Cas. temp. Lee, 511; and *post*,

p. 846, note (*i*).

(*z*) 1 Add. 158.

(*a*) See *Holland v. Prior*, 1 M.
& K. 245, 246, 247.

(*b*) *Gale v. Luttrell*, 2 Add. 234.

(*c*) *Bailey v. Bristowe*, 2 Robert.
145.

Ritchie v. Rees, 1 Add. 144.

v. Woodham, 1 Hagg.

Hagg. 241.

art. 919.

be compelled to give in an inventory, although his administration has expired (*d*).

An administrator *pendente lite* might have been compelled to exhibit an inventory, although a bill in Chancery for a discovery had been filed against him by another party (*e*). But his executors cannot be called on for such an inventory, in a suit respecting his Will by the representatives of a party claiming an interest, not pronounced for in the suit pending which he was appointed administrator (*f*).

Consequences
of hanging
back when an
inventory as-
signed.

The Ecclesiastical Court discouraged all hanging back with respect to the production of an inventory when called for, and generally condemned the parties who were guilty of it in costs (*g*). Where probate of a Will had passed in August, 1815, and the inventory had been assigned since the first session of Hilary Term, 1816, the Court in Easter Term of that year pronounced the executrixes contumacious (*h*).

Form and con-
tents of an
inventory.

The inventory exhibited by an executor or administrator ought to contain a full, true, and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causâ* of the testator or intestate (*i*). It must also distinguish such debts as are

(*d*) Taylor v. Newton, 1 Cas. temp. Lee, 15.

(*e*) Brotherton v. Hellier, 2 Cas. temp. Lee, 131.

(*f*) Lascelles v. Jobber, 1 Cas. temp. Lee, 443.

(*g*) Phillips v. Bignell, 1 Phil. 241, 243.

(*h*) Griffiths v. Bennet, 2 Phil. 364.

(*i*) Toller, 248. The usual form of the head of the inventory was stated by Sir G. Lee, in Plunket v. Sharpe, 1 Cas. temp. Lee, 624, to be "a true and perfect inventory of all the goods, chattels, and

credits of the deceased, that have come to the hands, possession, or knowledge" of the party. By Rules and Orders, 1862, Contentionous Business, 76, "In contentious business, inventories and not merely declarations of the personal estate and effects of the deceased are to be filed, unless by order of the judge or of a registrar:" and the form of an Inventory is given No. 27. See *ante*, p. 845, note (*y*), *post*, Pt. v. Bk. II. Ch. III. as to declarations in lieu of inventories.

though his administrator have been compelled to fill in Chancery for a by another party (e) for such an inventory, representatives of a party or in the suit pending (f).

all hanging back with the inventory when called for; no were guilty of it in had passed in August, signed since the first court in Easter Term of contumacious (h).

executor or administrator perfect description and personal, in possession or administrator is diminished from the heir, *usâ* of the testator or such debts as are

of the deceased, that have the hands, possession, or "age" of the party. By and Orders, 1862, Contem- business, 76, "In conten- business, inventories and not eclarations of the personal and effects of the deceased e filed, unless by order of e or of a registrar:" and of an Inventory is given. See *ante*, p. 845, note Pt. v. Bk. II. Ch. III. as rations in lieu of inven-

perate from those which are doubtful or desperate (k). But it was not necessary, according to the modern practice, that the appraisement and inventory should be made pursuant to the letter of the statute; and it was sufficient if the goods of the deceased should be appraised by any honest persons in the neighbourhood, and reduced into an inventory (l), which, when exhibited at the instance of a party interested, must be verified by special oath, either personally or by virtue of a commission; for the formal general oath of the executor or administrator will not be sufficient (m).

The Court can only require that all the deceased died possessed of should be included in the inventory: It cannot call for an account of the subsequent profits in his business (n). The Court has no jurisdiction over leaseholds of the deceased for lives held by a creditor or mortgagee: and therefore the inventory need not contain any reference to such property, or the rents thereof (o). Again, it is not competent for the Court of Probate to require an inventory of personal estate situate in a foreign country; for foreign estates are out of the jurisdiction and cognizance of the Court (p): And the law is the same as to effects lying in Ireland (q). In some instances, particularly in complicated cases, the Court will exercise a discretion as to the sort of inventory it will accept (r).

[These matters will be further considered hereafter (Pt. v. Bk. II. Ch. III.), when the subject of Remedies against Executors and Administrators in the Court of Probate is considered.]

The Court of Queen's Bench has, on more than one

Whether the
Spiritual Court

(k) Toller, 248.

(l) 1 Oughton, tit. 233, s. 1, 2. Burn, E. L. 310, 8th edit.

(m) 1 Oughton, *ubi supra*, note (d) 2. Toller, 250.

(n) Pitt v. Woodham, 1 Hagg. 250.

(o) Saville v. Morgan, 1 Cas.

temp. Lee, 431.

(p) Raymond v. Von Watteville, 2 Cas. temp. Lee, 551.

(q) Wilson v. Ogle, Prerog. 1737, cited 2 Cas. temp. Lee, 555.

(r) Reeves v. Freeling, 2 Philim. 56.

could entertain objections to an inventory.

occasion, decided, that, after an inventory was exhibited, the Ecclesiastical Court could entertain no objections to it (s).

Notwithstanding such decisions, it always continued the practice of the Prerogative Court of Canterbury to entertain objections to inventories (t).

But although the Ecclesiastical Court would allow an allegation to be given in objection to an inventory, and answers to be taken upon that allegation, yet it would not permit witnesses to be examined upon that allegation, in order to falsify the inventory (u). The foundation for this distinction is, that if the answers confess more assets than were inserted in the inventory, the Court may order the inventory to be amended by the insertion of these; but if further assets might be established by witnesses in opposition to the answers, the Court could not order them to be inserted in the inventory, which is required by the statute to be upon oath; nor could it compel the executor or administrator to swear to assets, the possession of which he has twice already upon oath denied (x).

Effects of inventory in temporal Courts.

An important question arises, with respect to the effect of inventories in the Common Law Courts, viz., how far an inventory exhibited by an executor or administrator in the Court of Probate is evidence against him, as proof of assets. But it will be more convenient to consider this point in a subsequent part of this Treatise, together with the subject of Remedies generally (y).

(s) *Hinton v. Parker*, 8 Mod. 168. *Catchside v. Ovington*, 3 Burr. 1922. *Henderson v. French*, 5 M. & S. 406. *Griffiths v. Anthony*, 5 A. & E. 623.

(t) *Telford v. Morison*, 2 Add. 319. *Shackleton v. Barrymore*, cited *ibid.*, p. 329.

(u) *Telford v. Morison*, 2 Add. 331.

(x) *Ibid.* It is suggested in a note to *Brogden v. Brown*, 2 Add. 340, by the reporter, that where the executor is also the party before the Court propounding the Will, the Court might perhaps permit depositions to be taken on the allegation, if the answers should prove unsatisfactory.

(y) See *post*, Pt. v. Bk. II. Ch. I.

SECTION IV.

Of Collecting the Effects.

The next duty of the executor or administrator is to collect all the goods and chattels so inventoried. For that purpose the law invests him with large powers (as it has already appeared, in considering the quantity of his estate, as well in action as possession): And it is incumbent on him to avail himself of his authority with reasonable diligence in the collection of the effects of the deceased. Therefore, if by unduly delaying to bring an action, the executor or administrator has enabled a debtor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable (z). So the executor or administrator must, within a convenient time, remove all the personal property of the deceased which he may have left on any land which goes to the heir, or to a reversioner or remainderman: otherwise such property may be distrained *damage feasant* (a). In the case of *Stodden v. Harvey* (b), a lessee for life of a house and pasture land died; his executors suffered his cattle to go there for six days after his death, and then removed them; and in trespass justified for that time, averring that in the space of six days they could not procure any other land or place whereon to put the cattle: The plaintiff demurred; and whether that were a convenient time to move them was the question: The Court inclined to be of opinion that six days was but a convenient time for removing, especially it being averred, that they had not any other place to remove them to: but for a fault in the plea, wherein the defendants pleaded a lease of the house, but not of the land in the declaration mentioned, it was adjudged for the plaintiff.

(z) *Hayward v. Kinsey*, 12 Mod.(a) See *ante*, p. 796.573, *post*, Pt. IV. Bk. II. Ch. II.(b) *Cro. Jac.* 204.

§ 11

CHAPTER THE SECOND.

OF THE PAYMENT OF DEBTS BY THE EXECUTOR OR ADMINISTRATOR ACCORDING TO THEIR PRIORITY OF DEGREE.

SECTION I.

1. *Of the Payment of the Expenses of the Funeral and of the Probate or Administration.* 2. *Of Debts due to the Crown.* 3. *Of Debts to which particular Statutes give Priority of Payment.*

HAVING considered in a previous part of this Treatise the quantity of the estate of an executor or administrator, it is now necessary to treat of his duty in the application of that estate, according to the order prescribed by the law.

1. Funeral expenses.

1. Before any debt or duty whatsoever, funeral expenses, with the proper limitation as to the amount, are, as it has already appeared (a), to be allowed out of the estate of the deceased. These expenses are to be preferred, even to a debt due to the Crown (b).

Expenses of probate, &c.

The next thing to justify and occasion expense is the proving of the Will or taking out administration (c): but a greater disbursement, says the author of "The Office of an Executor" (d), will not stand allowable, than is prescribed by the statute of 21 Hen. VIII. c. 5 (e).

Costs of administration suit.

The costs of an action in Chancery are to be considered as

- (a) *Ante*, p. 835 *et seq.*
 (b) *R. v. Wade*, 5 Price, 627, by Richards, C. B.
 (c) 2 Black. Comm. 511.
 (d) P. 260, 14th edit.
 (e) With respect to the proper fees for probate and letters of administration, see Burn's Eccles. Law, tit. Fees, and tit. Wills, vol. 4, p. 264, 291, 8th edit. "St.

Germaine (the author of the Doctor and Student, dial. 2, c. 10), who was no stranger to the canon and civil law, as appears by his book, saith, that the Ordinary ought to take nothing for probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it." Wentw. Off. Ex. 260, 14th edit.

expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court (*f*).

Where a Will contains a direction that the testator's "testamentary expenses" shall be paid out of a specified part of his estate, the costs of an administration suit are included under testamentary expenses (*g*).

Testamentary expenses.

There is no distinction between "executorship expenses" and "testamentary expenses" as regards what the phrase includes (*h*).

The term "executorship expenses" in a Will means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate: also the costs of the executors and other parties in an action, whether instituted by the executors themselves, or by a beneficiary, for the administration of the testator's personal estate: also the testator's funeral expenses: also expenses incurred by the executors for the protection of specific legacies, *e.g.*, for warehousing furniture specifically bequeathed, pending the distribution of the assets and payments by the executors in discharge of debts falling due from the testator's estate after his death, *e.g.*, rent due after the testator's death for a house of which he was tenant from year to year (*i*).

Executorship expenses.

2. The third occasion of disbursement by the executor or administrator is the payment of debts; and in such payment

2. Payment of debts.

(*f*) *Loomes v. Stotherd*, 1 Sim. & Stu. 461, by Sir J. Leach. *Tippling v. Power*, 1 Hare, 405, 411. *Gaunt v. Taylor*, 2 Hare, 413. *Newbegin v. Bell*, 23 Beav. 386. *Sanderson v. Stoddart*, 32 Beav. 155. And this priority will be allowed even over costs of litigation in the Ecclesiastical Court incurred in determining which is the testator's Will, and ordered by the latter Court to be paid out of the estate: *Major v. Major*, 2

Drewr. 281.

(*g*) *Miles v. Harrison*, L. R. 9 Ch. 316. *Harloe v. Harloe*, L. R. 20 Eq. 471. *Penny v. Penny*, 11 C. D. 440. The phrase "legal expenses" includes the costs of an administration suit: *Coventry v. Coventry*, 2 Dr. & Sm. 470. *Row v. Row*, L. R. 7 Eq. 414.

(*h*) *Sharp v. Lush*, 10 C. D. 468, 470, by Jessel, M.R.

(*i*) *Sharp v. Lush*, 10 C. D. 468.

Rules of
priority.

he must be careful to observe the rules of priority; for if he pay those of a lower degree first, he must on a deficiency of assets, answer those of a higher out of his own estate (*k*). So an executor or administrator is bound to plead a debt of a higher nature in bar of an action brought against him for a debt of inferior degree, and *riens ultra*, if he has not assets for both; otherwise it will be an admission of assets to satisfy both debts (*l*).

It is obvious that it is beyond the power of a testator to disappoint the rules of law as to the precedence of debts, by directing his executors to make an equal distribution of the assets among all his creditors (*m*).

With respect
to foreign
assets.

A question of no little difficulty is raised in Story's Conflict of Laws, § 524, *viz.*, Suppose a debtor dies domiciled in England, and leaves assets in a foreign country by the law of which all debts stand in an equal rank, and administration is duly taken out in the place of his domicile, and also in the place of the *situs* of the assets. What rule is to govern in the administration of the assets? The law of the domicile? or the law of the *situs*? That eminent writer states his own opinion to be (in accordance with the decisions of the American Courts, though at variance, as he admits, with that of many foreign jurists), that in regard to creditors the administration of assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them.

But in the case of *Wilson v. Lady Dunsany* (*n*), the Master of the Rolls (Sir J. Romilly) declined to adopt this opinion, and held that the personal assets of a testator must be administered on the principle of the law of his domicile. In that case the testator had died domiciled in Ireland, leaving personal assets partly there and partly in England; and, a question having arisen as to the priority of the claims of his creditors, his Honor laid it down that he must treat

(*k*) 2 Black. Comm. 511.

(*m*) *Turner v. Cox*, 8 Moo. P. C.

(*l*) *Rock v. Leighton*, 1 Salk. 288.

310. 1 Saund. 333 *a*, note (8).

(*n*) 18 Beav. 293.

the case in the same way as if he were sitting in the Court of Chancery in Dublin. In *Cook v. Gregson* (o), where the testator had also died domiciled in Ireland, leaving assets both in Ireland and England, and the same executors in both countries, it was held by Kindersley, V.-C., that an Irish judgment had priority over English simple contract creditors, as against Irish assets remitted to England by the executors and being there administered: His Honor said that if the executors in the two countries had been different persons, the duty of each would have been first to pay the debts owing in the country in which he was executor, and then he might send any surplus to the other country; and that the duty of the Irish executor was to pay the Irish debts first, according to their order of priority; and that, therefore, the Irish assets remitted here ought to be administered here as if they had remained and were being administered in Ireland.— It will be observed that in this case the Irish judgment creditor only sought to touch the Irish assets: And therefore it was unnecessary to apply the law as laid down by the Master of the Rolls in *Wilson v. Lady Dunsany*: But the observations of the V.-C. appear to put the question as though it were rather dependent on the *situs* of the assets than on the domicile of the deceased (p).

The view of the Vice-Chancellor seems to be the right one. Thus in the late case of *Re Klæbe* (q), it is laid down that if a man dies domiciled in England possessing assets in France, the French assets must be collected in France and distributed

(o) 2 Drewr. 286.

(p) See *Carron Iron Co. v. Mac-laren*, 5 H. of L. 455, 456, by Lord St. Leonards. And this view is borne out by the observations of Mr. Westlake in his work on Private International Law, 3rd edit. section 110, where he says that "every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased,

whether contracted in the jurisdiction from which the grant issued, or out of it, and whether, owing to creditors domiciled or resident in that jurisdiction, or out of it, in that order of priority which, according to the nature of the debts or of the assets, is prescribed by the laws of the jurisdiction from which the grant issued."

(q) 28 C. D. 175.

according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori* and for no other reason. But if it should happen that a man died domiciled in France leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected, must be distributed according to the law of England . . . the rule is, that all creditors are to be created equally, subject to what priorities the law may give them, from whatever part of the world they come. In that case Mr. Justice Pearson, after referring to the cases of *Cook v. Gregson* (r), *Eames v. Hacon* (s), and *Blackwood v. The Queen* (t), so far as such cases bear upon this question, concludes his judgment by saying, "There seems to be some mistake in the case of *Wilson v. Lady Dunsany* (u): it is unfortunate that the case was ever reported."

Priority of
solicitor's lien.

It should be observed, that by the constant rule of the Court of Chancery, a solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the duty decreed or fund recovered for the plaintiff, and a lien upon it, before the specialty creditors of the deceased plaintiff; neither can his executor or administrator controvert this rule, by insisting upon applying the assets in a course of administration (x).

Debts due to
the Crown.

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the Crown by record or specialty, claim the precedence (y). So that if there be not come to the executor or administrator goods of greater value than will suffice for the satisfaction of these, he is not to pay any debt to a subject: and if he be sued for any such, he may plead in bar of this suit that his testator or intestate

(r) 2 Drewr. 286.

(s) 18 C. D. 351.

(t) 8 App. Cas. 92.

(u) 18 Beav. 293.

(x) *Turwin v. Gibson*, 3 Atk. 720. *Lloyd v. Mason*, 4 Hare, 132.

(y) *Magna Charta*, c. 18. 2 Inst. 32. *Littleton v. Hibbins*, Cro. Eliz. 793. *Swinb. Pt. 6*, s. 16. *Wentw. Off. Ex.* 261, 14th edit. *Com. Dig. Admon.* (C. 2).

French creditors are in priority, that rule *pro fori* and for no other man died domiciled those assets can only administration, and according to the law creditors are to be the law may give they come. In that to the cases of *Cook* and *Blackwood v.* upon this question, it seems to be some *Dunsany (u)*: it is said."

constant rule of the creation of his trouble, it, has a right to be covered for the plain-alty creditors of the ator or administrator applying the assets

as well of a prior as the Crown by record So that if there be or goods of greater n of these, he is not e sued for any such, testator or intestate

na Charta, c. 18. 2 Inst. on v. Hibbins, Cro. Eliz. b. Pt. 6, s. 16. Wentw. 261, 14th edit. Com. n. (C. 2).

died thus much indebted to the king, showing how, &c., and that he hath not goods surmounting the value of that debt (z).

But the debts due to the Crown, which are so privileged, are confined to such as are due by matter of record or by specialty, &c. (a), (which are of the same nature; for by statute 33 Hen. VIII. c. 39, it is enacted, that all obligations and specialties, taken to the use of the king, shall be of the same nature as a statute staple). And, therefore, sums of money owing to the king on wood sales, or sales of tin, or other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record (b). So, though fines and amercements in the King's Court of Record are clearly debts of record (c), and entitled to such preference, yet amercements in the King's Courts Baron, or Courts of his Honors, which are not of record, have no such priority (d): nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties; for these are not debts of record (e).

So, also, the arrears of rent due to the Crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it appears, be regarded in the light of a debt by simple contract (f).

Again, it was held, that a recognisance in the Court of Chancery by a guardian in the matter of a minor, is not to be considered a debt due to the Crown (g).

But it seems, that if the king's debt, and likewise that of a subject, be both inferior to debts of record, the king shall be preferred (h).

By statute 55 Geo. III. c. 184, s. 45, the commissioners of stamps are authorized, in certain cases, to give credit for the

(z) Wentw. Off. Ex. 261, 14th edit. Godolph. Pt. 2, c. 28, s. 3. 3 Bac. Abr. 80, tit. Exors. (L.) 2.

(a) Wentw. Off. Ex. 262, 14th edit. Godolph. Pt. 2, c. 28, s. 3. Com. Dig. Admon. (C. 2).

(b) *Ibid.* 3 Bac. Abr. 79, 80, tit. Exors. (L.) 2.

(c) Godolph. Pt. 2, c. 28, s. 3.

(d) Wentw. Off. Ex. 263, 14th

edit. Com. Dig. Admon. (C. 2).

(e) *Ibid.*

(f) Com. Dig. Admon. (C. 2). Wentw. Off. Ex. 264, 14th. edit.; but see *infra*, p. 869.

(g) *Ex parte* Usher, 1 Ball & Beat. 199.

(h) Bac. Abr. *ubi supra*, n. (u).

duties on probates and administration; and by s. 48, it is provided, that the duty for which credit shall be so given shall be a debt to the Crown, and shall be paid in preference to any other debt whatsoever.

3. Debts to which particular statutes give priority:

money due to parish by overseers of the poor.

Officers of a Friendly Society.

3. Next in order are certain specific debts, which are, by particular statutes, to be preferred to all others. Such were formerly forfeitures for not burying in woollen under the statute of Charles, now repealed by stat. 54 Geo. III. c. 108; and such were debts for letters, not exceeding 5*l.*, to the Post Office (i).

Again, by stat. 17 Geo. II. c. 38, s. 3, it is enacted, that if any overseer shall die before the expiration of his office, "his executors, or administrators shall, within forty days after his decease, deliver over all things concerning his office to some churchwarden, or other overseer of the same place: and shall pay out of the assets left by such overseer all sums of money remaining due, which he received by virtue of his said office, *before any of his other debts are paid and satisfied.*"

Likewise, it was provided by statute 33 Geo. III. c. 54, s. 10 (k), that if any person appointed to any office by any Friendly Society, and having in his hands any money, or effects or securities belonging to the same, shall die, or become a bankrupt or insolvent, his executors, administrators, or assignees shall, within forty days after demand made by the order of any such society, or the major part of them assembled at any meeting, deliver all things belonging to such society to such persons as they shall appoint, and shall pay out of the assets or effects of such person all sums of money remaining due, which such person received by virtue of his said office, before any of his other debts are paid, and all such assets and effects shall be bound to the payment thereof accordingly.

This provision of the statute preferring the claim of Friendly Societies to those of all other creditors, it should

(i) 9 Ann. c. 13, s. 30. 2 Black. (k) Repealed by the stat. 10 Comm. 511. Repealed by the Geo. IV. c. 56. stat. 1 Vict. c. 32.

and by s. 48, it is
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38 Geo. III. c. 54,
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received by virtue
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ring the claim of
reditors, it should

ed by the stat. 10
6.

seem, is not favoured (*l*): and it has been held to be con-
fined to persons duly and formally appointed officers of the
society; and that it does not extend to any person to whom
the money of the society has been paid as banker, or to whom
the money has been lent upon security, paying interest (*m*).
And money *lent* to any officer of the society duly appointed,
or suffered to remain in his hands upon giving security,
has been determined not to be within the preference given
by the Act; the preference being given only in respect of
money which got into the hands of officers, independent of
contract (*n*).

Notwithstanding the censures which this enactment has
met from eminent Judges, it has, in substance, been
continued in the subsequent Friendly Societies Acts, and is
contained in that now in operation (38 & 39 Vict. c. 60, s. 15,
sub-s. 7).

By stat. 26 & 27 Vict. c. 57, special and minute provisions
are made for the preferential payment of regimental debts, and
the distribution of the effects of officers and soldiers in case
of death.

Regimental
debts.

Another instance may be adduced in the case of money
due from the deceased as treasurer or collector to paving
commissioners under the Metropolis Act, 57 Geo. III.
c. 29, s. 51 (local Act), by which it was enacted, that the
executors or administrators, &c., of any treasurer, collector,
or other officer, &c., should out of the estate and effects pay
the commissioners, &c., all such sums of money as had been
collected by the deceased, and due to the commissioners, in
preference to any other debt or debts (*except debts due to the
king's majesty*).

Treasurer, &c.
to paving com-
missioners.

It may here be observed that the words of these Acts are
very large, sufficient, as it seems, to give to the debts, which

Whether these
debts have
precedence
of the Crown.

(*l*) See the remarks of Lord
Eldon in *Ex parte* Ross, 6 Ves.
804. *Ex parte* Stamford Society,
13 Ves. 281.

(*m*) *Ex parte* Lancaster Society,
6 Ves. 98. *Ex parte* Ashley, 6

Ves. 441. *Ex parte* Corser, *ibid.*
Ex parte Ross, 6 Ves. 802.

(*n*) *Ex parte* Stamford Society,
15 Ves. 280. *Ex parte* Buckland,
Buck. 214.

are the subject of them, precedence to those due to the Crown: but, perhaps, they would not be so construed (o).

It may be convenient here to notice an important provision in section 10 of the Judicature Act, 1875, that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable; and as to the valuation of annuities, and future, and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such Company, may come in under the decree or order for the administration of such estate, or under the winding up of such Company, and make such claims against the same as they may respectively be entitled to by virtue of this Act." (p).

(o) 6 Ves. 99, by Lord Alvanley, in *Ex parte* The Lancaster Society.

(p) This section does not introduce into the administration of insolvent estates of deceased persons the provisions of s. 32 of the Bankruptcy Act, 1869 [s. 40 of the Act of 1883], that all debts, with certain exceptions, are to be paid *pari passu*. It affects only the rights of the class of secured creditors as conflicting with those of the class of unsecured creditors, and does not affect the rights *inter se* of the members of those classes: *Re*

Maggi, 20 C. D. 545. This decision as to the rights of secured and unsecured creditors *inter se*, however, is not necessarily conclusive to show that section 10 does not import into administration proceedings in Court so much of the Bankruptcy Act, 1883, as relates to the Crown's priority. Chitty, J., in *Re Oriental Bank Corporation*, *Ex parte* The Crown, 28 C. D. 643. 649, seems to treat the construction of this section on this point as an open question. See also the observation of Jessel, M. R., in the *Mersey Steel & Iron*

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so construed (o).

important provision
875, that "in the
of any person who
is Act, and whose
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l 1867, whose assets
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the same rules shall
ve rights of secured
and liabilities provi-
ies, and future, and
y be in force for the
y with respect to the
d all persons who in
ove for and receive
deceased person, or
, may come in under
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C. D. 545. This decision
ights of secured and un-
editors *inter se*, however,
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section 10 does not im-
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Oriental Bank Corpora-
arte The Crown, 28 C. D.
seems to treat the con-
of this section on this
an open question. See
observation of Jessel,
the Mersey Steel & Iron

SECTION II.

Of the Payment of Debts of Record—1. Judgments.

2. Decrees. 3. Statutes and Recognisances.

Next in priority, in the order prescribed for payment of debts, come those which are debts of record (q). And debts of this nature are of two sorts, to which belongs a subdivision of precedence.—1. Judgments in Courts of Record; 2. Recognisances and statutes.

Judgments in Courts of Record (r), whether obtained compulsorily against the testator or intestate, or confessed by him, are in a precedent degree, not only to all debts, but to recognisances and statutes (though the latter are also debts of record), and must be preferred by the executor or administrator, whether prior in point of time or not (s). Therefore, he must discharge a later or more puisne judgment in preference to a statute or recognisance in time precedent (t).

The next consideration is, what shall be considered judgments, so as to be entitled to this precedence. The privilege is not confined to judgments of the Supreme Court of Judicature, but extends itself to judgments in all other Courts of Record.

A judgment, which is entered up against the testator or intestate after his death, when that happens between verdict and judgment (u), shall be considered as if entered up in his lifetime, and entitled to priority of payment by his executors

1. Judgments :
their prece-
dence to re-
cognisances
and other
debts of re-
cord, as well
as to special-
ties.

What sort of
judgments are
entitled to
this prece-
dence :

Co. v. Naylor, 9 Q. B. D. 648, 662.
S. 125 of the Bankruptcy Act,
1883, provides for the administra-
tion in bankruptcy of the insolvent
estate of a deceased debtor, upon
the petition of a creditor whose debt
would have been sufficient to sup-
port a bankruptcy petition against
such debtor had he been alive, and
that notice to the legal representa-
tive of a deceased person of the
presentation by a creditor of a peti-
tion under this section shall, in the
event of an order for administra-
tion being made thereon, be deemed
equivalent to a notice of an act of

bankruptcy.

(q) Wentw. Off. Ex. 265, 14th ed.

(r) *I.e.*, judgments docketed or
entered according to the statutes
now in force. See *post*, p. 862,
note (l).

(s) Wentw. Off. Ex. 266, 270,
14th edit. 1 Roll. Abr. 926.
Exors. (R.) pl. 1, 2.

(t) Wentw. Off. Ex. 267, 14th ed.

(u) R. S. C. 1883, Ord. xvii.,
r. 1, which on this point is founded
on s. 139 of the Common Law Pro-
cedure Act, 1352, which was a re-
enactment of 17 Car. II. c. 8, s. 1,
now repealed.

or administrators accordingly (x). But where his death happens between interlocutory and final judgment, it is otherwise; for such judgment is not to be entered against the testator or intestate, but against his executor or administrator (y). And it is the same where the death happens after the writ of inquiry is executed, and before final judgment (z).

Formerly, a judgment signed after the testator's death, at any time during the term in which he died, or the subsequent vacation, was, by relation, a judgment of the first day of the term (a), and therefore it was considered that, if the defendant died after the first day of the sittings and before the trial, the case was within the remedy of the stat. 17 Car. II. c. 8 (aa). But now, by R. S. C. 1883, Ord. XLI. r. 3, it is provided that where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or a Judge shall otherwise order, and the judgment shall take effect from that date: Provided that by special leave of the Court or Judge a judgment may be ante-dated or post-dated. And by r. 4 it is provided, that in all cases not within rule 3, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that day (b).

what are not.

A judgment in a foreign country is considered, in our Courts, merely as a debt by simple contract (c). And it is settled that an Irish judgment is not, since the Union, entitled to priority as an English judgment (d).

(x) *Burnet v. Holden*, 1 Lev. 277. *Colebeck v. Peck*, 2 Lord Raym. 1280. It is presumed that these cases, which were decided on 17 Car. II., will be authorities on the construction of the latter portion of Ord. XVII. r. 1, notwithstanding the words of Ord. XLI. rr. 3 and 4, which are to the same effect as r. 56 of the Rules of Hilary Term, 1853.

(y) *Weston v. James*, 1 Salk. 42.

2 Saund. 72 r, 6th edit. 1 Com. Dig. Pleader (2 D. 9). *Smith v. Eyles*, 2 Atk. 386, by Lord Hardwicke. (z) *Goldsworthy v. Southcott*, 1 Wils. 243.

(a) *Bragner v. Langmead*, 7 Term. Rep. 20.

(aa) *Jacobs v. Miniconi*, 7 T.R. 31.

(b) See *ante*, p. 782.

(c) *Dupleix v. De Roven*, 2 Vern. 540. *Walker v. Witter*, Dougl. 1.

(d) *Harris v. Saunders*, 4 B. &

where his death judgment, it is otherwise entered against the executor or administrator. If death happens after the final judgment (*z*). At the testator's death, at the trial, or the subsequent day of the judgment, if the defendant before the trial, the 7 Car. II. c. 8 (*aa*). r. 3, it is provided by the Court or a judgment shall be dated as pronounced, unless the judgment and the judgment shall be ante-dated, that in all cases shall be dated as of the date they are left with the executor, and the judgment is considered, in our contract (*c*). And it is not, since the Union, judgment (*d*).

2 r. 6th edit. 1 Com. Dig. D. 9). *Smith v. Eyles*, by Lord Hardwicke. *Southworth v. Southcott*, 1 *Mermer v. Langmead*, 7 20. *Obs v. Miniconi*, 7 T. R. 31. *ante*, p. 782. *Leix v. De Roven*, 2 Vern. *ker v. Witter*, Dougl. 1. *is v. Saunders*, 4 B. &

A judgment against the executor or administrator himself is not to be considered within the same class as those which are recovered against the deceased (*e*). Such a judgment stands altogether on a different footing. It may be briefly stated in this place, that, with respect to other creditors of the deceased, a creditor, who has obtained a judgment against the executor, has no priority, except with regard to debts of equal degree with that upon which he has obtained judgment (*f*). Among such, his debt is allowed the precedence, because the executor ought to pay that creditor first who uses the first diligence (*g*). Therefore, the executor may plead in bar to an action by a simple contract creditor, that there is a judgment unsatisfied which another simple contract creditor has obtained against him, the executor, and that it will exhaust the assets to satisfy that judgment: But such a plea is not allowable in an action by a creditor of superior degree, as upon a bond of which the executor had notice, or a judgment which has been docketed or entered (*h*). It must, however, be observed, that, as between the executor himself, and the creditor who has obtained judgment against him, such judgment (except in the instance of judgment of assets *in futuro*) must be satisfied, at all events, without reference to the state of the assets, or the claims of superior creditors: for, if the estate of the deceased is insufficient to satisfy it, the executor may be compelled to do so *de bonis propriis* (*i*).

C. 411. *Ferguson v. Mahon*, 11 A. & E. 179: that is no priority against English assets; for a foreign judgment would be allowed, on an administration here, any priority which it had by the law of the country under whose grant foreign assets have been remitted to England.

(*e*) *Wentw. Off. Ex.* 270, 14th edit.

(*f*) And this is so notwithstanding the provisions of s. 10 of the Judic. Act, 1875, which affect

only the rights of the class of secured creditors as conflicting with the class of unsecured creditors, and does not affect the rights *inter se* of the members of those classes: *Re Maggi*, 20 C. D. 545.

(*g*) *Ashley v. Pocock*, 3 Atk. 208. *Dollond v. Johnson*, 2 Sm. & Giff. 301.

(*h*) See *infra*.

(*i*) See *infra*, Pt. v. Bk. II. Ch. I. *Abbis v. Winter*, 3 Swanst. 579, note.

Effect of judgments against executors.

If a judgment be satisfied, and is only kept on foot to wrong other creditors; or if there be a defeasance of the judgment yet in force; then this judgment will not avail to keep off other creditors from their debts (*k*).

Stat. 23 & 24
Vict. c. 38, s.
3: judgments
not docketed
to have no
priority.

It is enacted by stat. 23 & 24 Vict. c. 38, s. 3, "that no judgment, which has not already been, or which shall not hereafter be, entered or docketed under the several Acts now in force (*l*), and which passed subsequently to the stat. 4 & 5 W. & M. c. 20, so as to bind lands, tenements and hereditaments, as against purchasers, mortgagees or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors', testators' or intestates' estates."

It has been held, in conformity with the case of *Gaunt v. Taylor (m)*, decided on 4 & 5 W. & M. c. 20, that the statute applies only to judgments against the testator or intestate, and not to judgments obtained against the executor or administrator (*n*).

This statute applies equally to judgments of County Courts as to other judgments (*o*).

An unregistered judgment ranks only as a simple contract debt (*p*).

Stat. 23 & 24
Vict. c. 38, s.
4: judgments
as against
heirs and ex-
ecutors to be
registered.

By the 4th section of the same statute, it is enacted, that no judgments, which since the passing of the stat. 1 & 2 Vict. c. 110, have been registered under the provisions therein contained, or contained in the later Act 2 & 3 Vict. c. 11 (as explained and amended by the stat. 18 & 19 Vict. c. 15), or which hereafter shall be so registered, "shall have any preference against heirs, executors, or administrators in their

(*k*) Wentw. Off. Ex. 268, 14th edit. See *infra*, Pt. v. Bk. II. Ch. I.

(*l*) viz., Stat. 1 Vict. c. 110, s. 19. Stat. 2 & 3 Vict. c. 11. Stat. 3 & 4 Vict. c. 82, and Stat. 18 & 19 Vict. c. 15.

(*m*) 3 M. & Gr. 886.

(*n*) *Jennings v. Rigby*, 33 Beav. 198. *Re Williams' Estate*, L. R. 15 Eq. 270. In which case it was

decided by Wickens, V.-C., that the effect of the stat. 32 & 33 Vict. c. 46 (*post*, p. 869), is to postpone a specialty debt to a judgment, though unregistered, obtained against an executor for a simple contract debt.

(*o*) *Re Turner*, 33 L. J. Ch. 232.

(*p*) *Van Ghelwe v. Nerinckx*, 21 C. D. 189.

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n *Ghehuive v. Nerinckx*,
189.

Ch. II. § II.] *Of Debts of Record—Decrees in Equity.*

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administration of their executors' [*i.e.*, ancestors' *semble*],
testators' or intestates' estates, unless at the death of the
testator or intestate five years shall not have elapsed from the
date of the entry thereof on the docket, or from the only or
last re-registry thereof, as the case may be, which re-registry
from time to time is hereby authorized to be made, in manner
directed by the said Act of 2 & 3 Vict. (as explained and
amended by the stat. 18 & 19 Vict.): but it shall be deemed
sufficient, to secure such preference as aforesaid, if such a
memorandum as was required in the first instance is again
left with the Senior Master of the Common Pleas (now with
the Central Office of the Supreme Court) within five years
before the death of the testator or intestate, although more
than five years shall have expired by effluxion of time since
the last previous registration before such last-mentioned
memorandum or minute was left, and so *toties quoties* upon
every re-registry."

By sect. 5, "In the construction of the previous provisions Sect. 5.
the term 'judgment' shall be taken to include registered
decrees, order of Courts of Equity and Bankruptcy, and other
orders having the operation of a judgment."

It has been held that the 4th section of this statute (above
stated) is not retrospective (*q*).

The statute 2 & 3 Vict. c. 11, s. 4, directs, that all judg- Stat. 2 & 3
ments registered pursuant to the provisions of the stat. 1 & 2 Vict. c. 11,
s. 4.
Vict. c. 110, shall, after the expiration of five years from the
former registration, unless re-registered within that time, "be
null and void against lands, tenements, and hereditaments as
to purchasers, mortgagees, or creditors." It was held by
Wood, V.-C., that the word "creditors" referred only to
creditors who had some interest in the land; and therefore,
that a judgment, though not duly re-registered, was not void
as against creditors generally (*r*).

(*q*) *Evans v. Williams*, 2 Dr. & held to be deprived, by sect. 3, of
Sm. 325. But a judgment signed priority in the administration of
before the passing of the Act, and his assets: *Kemp v. Waddingham*,
not registered till after the death L. R. 1 Q. B. 355.
of the testator, which happened
(*r*) *Simyson v. Morley*, 2 Kay
after the passing of the Act, was & J. 71.

Judgments
have no prece-
dence among
themselves.

Between one judgment and another obtained against the deceased, as they stand among themselves, precedence or priority of time is not material, as far as regards the personal estate (*s*). Nor is there preference to be claimed by the creditor with respect to the original cause of action; for a judgment against the testator on a debt by simple contract, is of the same nature as a judgment on a specialty (*t*).

Of several judgment creditors, therefore, he who first sues out execution must be preferred; and before any execution sued, it is at the election of the executor or administrator to pay whom he will first (*u*).

2. Decree in Equity:

equal to a
judgment at
law:

the executor
could not plead
it at law, but
must have had
an injunction:

what sort of
decree entitled
to this prece-
dence.

2. A decree in a Court of Equity, obtained against the testator or intestate, was, in respect to the course of administering assets, equivalent to a judgment at law against him, and stood in the same order of payment.

However, an executor or administrator, if sued at law for a debt of inferior degree, could not plead or give in evidence a decree of a Court of Equity (*x*). But he might relieve himself by a bill in equity, and have an injunction (*y*).

A decree not conclusive of the matters in question, as if it be merely to account, and which does not ascertain the sum to be paid, is no complete judgment until the account be stated. Therefore, it was held, that, pending a bill in equity, and after such decree against his testator, an executor might pay any other debt of a higher or equal nature, in case the assets be legal, although he had no power to do so, as against a final decree (*z*).

A common order in a foreclosure action gives no priority; for it is not an order for payment of money, but only in bar of the equity of redemption (*a*).

3. Recognisances and statutes:

8. Recognisances and statutes. Next in rank to judgments and decrees are recognisances and statutes.

(*s*) Wentw. Off. Ex. 269, 14th ed.

(*t*) Toller, 264.

(*u*) Wentw. Off. Ex. 269, 14th ed.

(*x*) Stasby v. Powell, 1 Freem.

(*y*) *Ibid.* Harding v. Edge, 1 Vern. 143.

(*z*) Smith v. Eyles, 2 Atk. 385.

(*a*) Wilson v. Lady Dunsany 18 Beav. 293, 299.

A recognisance is an obligation of record ; it may be entered into by the party before a Court of Record, or a magistrate duly authorised, conditioned for the performance of a particular act ; as to appear at the assizes, to keep the peace, to pay a debt or the like (*b*). A recognisance is, in most respects, like another bond. The chief distinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*, the former is an acknowledgment on record of a prior debt, of which the form is : " That A. B. doth acknowledge to owe our lord the king (to the plaintiff, to C. D., or the like), the sum of ten pounds," with condition to be void on performance of the thing stipulated. And in such case, the king (the plaintiff, or C. D.) is called the cognisee, *is cui cognoscitur*," as he that enters into the recognisance is called the cognisor, "*is qui cognoscit*." This instrument being either certified to, or taken by the officer of some Court, is authenticated only by the record of such Court, and not by the party's seal (*c*).

A recognisance is not a record until it is enrolled (*d*), and although the creditor claiming under a recognisance not enrolled will still be considered as a bond creditor, the sealing and acknowledging thereof supplying the want of delivery (*e*), yet this will give it no preference since 32 & 33 Vict. c. 46.

If a recognisance be enrolled by special order of Court after the time for the enrolling of it has elapsed, that makes the recognisance effectual from the time of the date (*f*). But whenever the Court permits the enrolling of a recognisance, after the time elapsed, it always takes care not to hurt an intervening purchaser (*g*).

Of securities by statute, there were three species ; statutes merchant, statutes staple and recognisance in the nature of

securities by statute :

(*b*) 2 Black. Comm. 341.

Wms. 334, 340.

(*c*) *Ibid*.

(*f*) Fothergill v. Kendrick, 2

(*d*) Glynn v. Thorpe, 1 Barn. & Ald. 158.

Vern. 234.

(*g*) 1 P. Wms. 340, 2 Vern. 234.

(*e*) Bothomly v. Fairfax, 1 P.

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statutes staple ; and though they are fallen into disuse and the statutes on which they depended repealed, yet, as they are frequently alluded to in argument, especially on this subject, it seems necessary to give some explanation of them.

statute merchant :

A statute merchant is a bond of record acknowledged before the Mayor of London, or chief warden of some other city or town, or other discreet men, chosen and sworn for that purpose, when the mayor or chief warden cannot attend, or before one of the clerks of the statute merchant nominated by the king, pursuant to the statute of Acton Burnell, 11 Edw. I. (enforced and amended by statute 13 Edw. I. st. 3, *de mercatoribus*). This recognisance is to be entered by the clerk on a roll, which must be doubled, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand an obligation, to which the debtor's seal, together with the seal of the king appointed for that purpose, shall be affixed (*h*). The design of this security was to encourage trade, by providing a sure and speedy remedy for merchants, strangers as well as natives, to recover their debts at the day assigned for payment. Afterward, other persons, observing that it was much of the same nature with a judgment, but obtained with infinitely less trouble and expense, frequently entered into this species of contract, until, by degrees, it became a common assurance, as we find it at this day. The addition of the king's seal was to authenticate the security, and to make it of so high a nature, that, on failure of payment by the debtor at the day assigned, execution might be awarded without any mesne process to summon him, or the trouble or charge of bringing in proof of the debt.

statute staple :

A statute staple is a bond of record, acknowledged before the mayor of the staple, in the presence of the constables of the staple, or one of them, pursuant to stat. 27 Edw. III. st. 2, c. 9. To this end the statute requires, that there shall be a seal ordained, which shall be affixed to all obligations made

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on such recognisances acknowledged in the staple, and the seal shall remain in the custody of the mayor of the staple, under the seals of the constables (i). This security was also only designed for the merchants of the staple, and for debts on the sale of merchandises brought there; but, in time, others began to apply it to their own ends: and the mayor and constables would take recognisances from strangers, surmising it was made for the payment of money for merchandises brought to the staple. To prevent this mischief, the Parliament, by statute 23 Hen. VIII. c. 6, s. 11, reduced the statute staple to its former channel, and laid a penalty of 40*l.* on the mayor and constables who should extend the benefits of the statute to any but those of the staple.

But though that statute deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognisance on 23 Hen. VIII. c. 6, or a recognisance in the nature of a statute staple, so called, because this Act limits and appoints the same process, execution, and advantage in every particular, as is provided for the statute staple (k). A recognisance, therefore, in nature of a statute staple, as the words of the Act declare, is the same with the statute staple, only acknowledged before other persons; for, as the statute runs, the chief justices of the King's Bench and Common Pleas, or in their absence out of term, the mayor of the staple at Westminster, and the recorder of London jointly together, shall have power to take recognisances for payment of debts in the form set down by the statute (which see in section 2 of the statute 23 Hen. VIII. c. 6). In this, as in the former cases, the king appoints a seal to attest the contract, and each of the justices has the keeping of one such seal, and the mayor of the staple at Westminster and recorder another, of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and

Recognisance
in nature of
statute staple;

(i) Bac. Abr. Execution, 331, 332.

(k) Bac. Abr. Execution, 332.

the seal of the chief justice, or the seals of the mayor and recorder, before whom it is taken, who are likewise obliged to subscribe their names.

A statute, which is void for the want of the formalities required by the Act of Parliament, shall be considered a bond, and have the same rank among debts as to payment (*l*).

Although recognisances are entered on the rolls of the King's Courts, while statutes are consigned to the custody of the party, and hence are called pocket records (*m*), yet both species of securities, having been entered into voluntarily and privately, are regarded as equal in their nature, and payable in the same order (*n*). Nor is it material, in regard to payment by the executor, which of them are prior or subsequent in point of date: Therefore, where there are many cognisees, he may prefer a subsequent to a prior statute or recognisance; for they all equally affect the personal estate, although, as to lands, the first in point of time shall have the preference (*o*).

If a statute be joint and several, the cognisee may elect to sue either the surviving obligor, or the executor of him who is dead, or both, in separate actions: If it be joint only, the survivor alone is liable (*p*). And, therefore, the executor of the deceased conusor cannot set up any payment of such a statute.

With respect to recognisances and statutes for the payment of money on a future day, or on a contingency, they will be considered more conveniently hereafter together with debts by specialty of the same nature (*r*).

(*l*) *Hollingworth v. Ascue*, Cro. Eliz. 355, 461, 494, 544. S. C. Moor. 405. 2 Roll. Abr. 140. Obligation, (I.).

(*m*) *Harrison's case*, 5 Co. 28, b.

(*n*) *Wentw. Off. Ex.* 273, 14th edit. Toller, 275.

(*o*) *Wentw. Off. Ex.* 273, 14th edit. 3 Bac. Abr. 81, tit. Exors. (L. 2). Com. Dig. Admon. (C. 2).

(*p*) *Rogers v. Danvers*, 1 Mod. 165. S. C. 1 Freem. 127.

(*r*) *Infra*, p. 871.

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p. 871.

SECTION III.

Of Debts by Specialty, and by Simple Contract

Formerly next in precedence in the order of payment were debts by special contract; as on bonds, covenants, and other instruments under the seal of the party: all these must have been paid by an executor or administrator before debts by simple contract (s).

But now by stat. 32 & 33 Vict. c. 46, after reciting "that it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons," it is enacted by s. 1, that in the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt: but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt.

Stat. 32 & 33
Vict. c. 46.
All specialty
and simple
contract debts
of deceased
persons to
stand in equal
degree after
1st of January,
1870.

A debt for rent which also ranked in the same degree as a debt by obligation, or other instrument under seal, has now no preference (t).

Rent.

A bond or covenant merely voluntary shall be postponed to simple contract debts, which are *bonâ fide* owing for valuable consideration; but such bond or covenant, if not

Voluntary
bonds or cove-
nants.

(s) Pinchon's case, 9 Co. 88, b.

(t) *Re Hastings*, 6 C. D. 610. A landlord has therefore no preferential claim against the estate

of a deceased tenant for rent in arrear at the death of the tenant as against the simple contract creditors: *ibid.*

to the prejudice of creditors, must be paid by the executor, and in preference to legacies (*u*). For a bond or covenant, however voluntary, transfers a right in the lifetime of the obligor; whereas legacies arise from the Will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his lifetime (*x*).

Accordingly it has been held, that the payment of the expenses of the reconveyance of mortgaged premises to the real representative, and the costs of an ejectment to recover the mortgaged premises, ought to be postponed by an executor to the payment of an annuity creditor by voluntary deed: And further, that an executor cannot, as against such voluntary creditor, be allowed a payment made out of the assets on account of a mortgage debt, created by an ancestor of the testator, to whom the mortgaged estate had descended (*y*).

In the case of *Tanner v. Byne* (*z*), a husband made a post-nuptial settlement of 4,000*l.* in favour of his wife and children; and then, in consideration of the 4,000*l.* expressed to have been lent to him by the trustees of the settlement, he made a mortgage to them of a real estate to secure that sum, and covenanted to repay it: The husband never, in fact, paid the 4,000*l.* to the trustees; nevertheless, it was holden by Sir John Leach, V.-C., that they were specialty creditors of the husband. Further, it has been held that a voluntary bond, *assigned for value*, ought, in the administration of assets, to stand upon the same footing as a bond originally given for value: And accordingly it was decided that the assignee for value of an equitable interest in the money payable under

(*u*) *Jones v. Powell*, 1 Eq. Cas. Abr. 84, pl. 2. *Cox v. Barnard*, 8 Hare, 310. *Hales v. Cox*, 32 Beav. 118. *Dawson v. Kearston*, 3 Sm. & G. 314. Creditors by specialty, who are mere volunteers as against the devisees of the debtor,

have a right to stand in the place of mortgagees: *Lomas v. Wright*, 2 M. & K. 769.

(*x*) *Toller*, 283.

(*y*) *Edwards v. Edwards*, 2 Cr. & Mees. 612.

(*z*) 1 Sim. 160.

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a voluntary bond, was not postponed to simple contract debts (a).

An executor has no authority to pay a bond founded on an usurious contract (given when by law usury was prohibited) or a bond *ex turpi causâ*: such payment will amount to a *devastavit*, as well against legatees as against creditors (b).

Bonds usurious
or *ex turpi*
causâ.

With regard to priorities of the different classes of debts a distinction has always been drawn between contingent securities and those for future debts. Thus it was held that if a statute or recognisance were for the payment of a sum of money at a day certain, although the day were not arrived, yet it was a debt of the same class with other statutes; for it was a present and immediate duty to be discharged at a future period (c).

Future debts.

But where there were two debts upon specialties, and of one the day of payment was past, and of the other the day of payment was not come, it was held that the executor might not pay the latter debt before the former (d).

With respect to contingent debts, the executor cannot generally pay anything until the contingency has occurred, and could not formerly refuse to pay a simple contract debt on the ground that he might have to provide for contingent specialty debts. This latter proposition appears from the cases cited below as they stood in former editions of this Work. But with regard to the former proposition it is to be observed that inasmuch as, if the estate of the deceased is insolvent it is provided by sect. 10 of the Judicature Act, 1875, that the same rule shall prevail and be observed as to debts and

Contingent
debts.

(a) *Payne v. Mortimer*, 4 De G. & Jones, 447.

(b) *Winchcombe v. Bishop of Winchester*, Hob. 167, cited 1 Brownl. 33. *Robinson v. Gee*, 1 Ves. Sen. 254.

(c) *Robson v. Francis*, 1 Roll. Abr. 925. Exors. (Q.) 2. 1 Roll. Rep. 405, pl. 36. S. C. cited by

Vaughan, C. J., Vaugh. 103. Goldsmith v. Sidnor, 1 Roll. Abr. 925, 926, pl. 4. S. C. Cro. Car. 362.

(d) 1 Roll. Abr. 927, tit. Exors. (R.) pl. 5 (citing Doctor and Stud. 77, b. 9 E. 4, 13). *Wentw. Off. Ex. Ch. 12*, pp. 277, 278, 14th edition.

liabilities provable, and as to the valuation of annuities and future and contingent liabilities, respectively, as may be in force for the time being under the law of bankruptcy with respect to the estate of persons adjudged bankrupt, it would seem that in the case of insolvent estates a contingent creditor may have his debt valued and prove immediately.

With respect to contingent securities, it was held that they should not stand in the way of debts of inferior degree: Therefore, if the condition of a recognisance were for the payment of 100*l.* to an infant when he came to his full age, the recognisance during the infancy was no bar to debt upon bond, because it was uncertain whether ever anything should be paid upon the recognisance; for the infant might die before his full age, and then nothing should be paid (*e*). So the payment of a simple contract debt before a bond conditioned for indemnity used, when specialty debts had a preference, to be held good, if no breach of the condition had taken place (*f*). And if subsequently to the payment of the simple contract debt, the contingency happened, and the bonds were put in suit, it was a good defence for the executor that he had paid the simple contract debt, and had no more assets wherewith to satisfy the bond (*g*).

In the case of *Read v. Blunt* (*h*), the testator had entered into a covenant with the plaintiff, for securing to him an annuity for his life, and had executed a warrant of attorney, as a further security, but judgment had not been entered up

(*e*) *Robinson v. Francis*, Bridgm. 79. S. C. 1 Roll. Abr. 925, tit. Exors. (Q.) pl. 3, 1 Roll. Rep. 405, pl. 36. *Harrison's Case*, 5 Co. 28, *b*.

(*f*) *Eeles v. Lambert*, Aley, 40. S. C. cited in 2 Vern. 101.

(*g*) See *Collins v. Crouch*, 13 Q. B. 542. *Accord.* See also *Philips v. Echard*, Cro. Jac. 8, where all the Court agreed, that if an executor pay debts upon an obligation, before a statute is broken, and afterwards a covenant is bro-

ken, whereby suit is upon that statute, payment of the debt upon the obligation, and that he hath no more in his hands of the testator's goods, is a good bar against the statute. However, in *Woodcock v. Hern*, Goldsb. 142, pl. 57, the reporter assumes, that if the executor pays the debt and the statute is broken, he would be chargeable by a *devastavit* of his own proper goods.

(*h*) 5 Sim. 567.

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under it: The bill prayed for an account of the testator's assets, and that the defendants, his executors, might be ordered to set apart a sufficient part of the assets, to answer the future payments of the annuity: and that in the meantime they might be restrained from parting with any of the assets, either to the creditors or legatees of the testator: Some of the testator's simple contract debts remained unpaid, but the annuity was not in arrear, and the executors had a balance in hand: And it was contended that the relief asked was frequently granted in the case of legatees (i): But Sir L. Shadwell, V.-C., refused the motion for an injunction, and said, that "if there was anything like misapplication of assets in this case, that would be a reason for the Court interfering: The executors may, by law, the day before an instalment of the annuity becomes due, apply the whole of the assets to pay the simple contract debts (k): The case of a bond creditor is different; for, when the condition of a bond is broken, the whole penalty is due: Here no case has been made out of probable misapplication of assets; and certainly none has been made out of the past misapplication."

However, where the contingency has taken place by a breach of the condition, the securities will stand in the same

(i) *Slanning v. Style*, 3 P. Wms. 336. The question, whether an annuitant under a *Will*, has a right to have an adequate portion of the assets set aside for the satisfaction of his legacy, turns on an entirely different principle, connected with the appropriation of legacies payable *in futuro*. As to which, see *post*, Pt. III. Bk. III. Ch. IV. § IV.

(k) As the law stood, at the time of this decision, the annuity could not have been apportioned; and therefore, the debt was *contingent* on the event of the annuitant liv-

ing till the day of payment; and the case fell within the rule (above stated) as to the priority of simple contract debts payable *in presenti* to contingent debts by specialty. But since the stat. 4 Wm. IV. c. 92, s. 2 and 33 & 34 Vict. c. 35, (see *ante*, p. 729,) the claim of the personal representatives of the annuitant for an apportionment may, perhaps, stand on a different footing, and be entitled so far as regards the part apportionable to the past to have it treated as a debt *in presenti*.

rank as other debts, and the conusees, obligees, or covenantees may enforce their claims under them, as debts due *in presenti*, whether the debt is ascertained, or the damages are unliquidated; Thus in *Cox v. Joseph* (l), the testator had executed a bond in 2,800*l.* conditioned to indemnify the obligee against another bond for 800*l.* which he had executed jointly with the testator as surety for the debt of the testator, in whose lifetime the 800*l.* had become due, and were still unpaid: And it was held a good plea in bar by the executrix, to a simple contract creditor, that the bond for 2,800*l.* was unpaid, and that she had not assets more than sufficient to satisfy the penalty of it. So in *Musson v. May* (m), the intestate and another were jointly indebted as partners, and the intestate, for a valuable consideration, on dissolving partnership, covenanted that he alone would pay the joint debts, and indemnify his partner against them: The intestate died, leaving partnership debt discharged: And Sir Wm. Grant held, that the covenantee was to be considered as a specialty creditor under the covenant, at the time of the death of the intestate.

In an early decision (n), the testator acknowledged a recognisance in the nature of a statute staple, whereof the defeasance was, that, whereas the conusee and testator were bound in a bond to B., a stranger, for the debt of the testator, and as his surety, with condition for payment of 100*l.* at a day yet to come, it was granted by the said defeasance, that if the testator, his executors, or assigns, paid the 100*l.* to B. at the day, then the statute should be void: And it was holden, that, though in this case the day of payment was not yet come, and though it was a collateral sum to be paid to a stranger to the statute, and not to the conusee, and so no duty to the conusee, and peradventure the heir of the testator would pay the money at the day, yet, inasmuch as it was for payment of the money certain, for which, by intendment, the executor

(l) 5 T. R. 307.

(m) 3 V. & B. 194.

(n) *Goldsmith v. Sidnor*, 1 Roll. Abr. 925, tit. Exors. (Q.) pl. 4.

creditors, obligees, or co-obligors, under them, as debts ascertained, or the

Ex v. Joseph (l), the debt conditioned to indemnify for 800*l.* which he gave as surety for the debt of 100*l.* had become due, was a good plea in bar by the debtor, that the bond had not assets more

than the debt. So in *Musson v. Musson*, the jointly indebted as co-debtors, on the consideration, on which he alone would pay the debt against them: the debt discharged: the mortgagee was to be conveyed, at the time

acknowledged a recognizance, whereof the debt and testator were the debt of the testator, the payment of 100*l.* at a day of forfeiture, that if the debt of 100*l.* to B. at the day. And it was holden, that the debt was not yet come, but was paid to a stranger to the debt, so no duty to the testator would pay the debt, it was for payment of the debt, the executor

Smith v. Sidnor, 1 Roll. tit. Exors. (Q.) pl. 4.

would be charged, the executor might plead this statute, in bar of an action of debt upon a bond, before the day of payment came.

Last in order of payment came debts on simple contract; as on bills or notes not under seal, and verbal promises, or such as are implied in law. Debts by simple contract.

Of debts of this nature, those due to the King shall, it seems, be satisfied before debts due to subjects (o). The wages, also, of domestic servants and of labourers, are considered by some authorities to be entitled to a preference (p).

(o) 3 Bac. Abr. 80, tit. Exors. (L.) 2.

(p) 2 Black. Com. 511. Toller, 286. It is difficult to point out any legal ground on which such preference can be claimed. Blackstone refers to 1 Roll. Abr. 927, where it is said that debts for servants' wages, within the Statute of Labourers, shall be paid before simple contracts, "*come moi semble*." This distinction as to wages within the statute seems to refer to the doctrine, that an action of debt would lie for them, against an executor, but not for other wages. That difference, however, appears to have ceased to be of any importance, since it has been established that *assumpsit* lies against an executor on the simple contract of his testator. See *post*, Pt. v. Bk. II. Ch. I. With regard to the payment of wages in the distribution of the estate of a person dying insolvent, the statute 51 & 52 Vict. c. 62 should be noted. This statute enacts: Sect. 1 (1) That in the distribution of the property of a bankrupt and of the assets of any company being wound up under the Companies Act, 1862,

and the amending Acts, there shall be paid, in priority to all other debts, all wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order, or, the commencement of the winding-up not exceeding £50; and all wages of any labourer or workman not exceeding £25 whether payable for time or for piecework, in respect of services rendered to the bankrupt or the company during two months before the date of the receiving order or the commencement of the winding-up; with a proviso in the case of a labourer in husbandry, who has contracted for the payment of part of his wages in a lump sum at the end of the year of hiring, that he shall have priority for the whole of such sum or such proportional part as the Court decides to be due. And sect. 1 (6) that the above provisions shall apply in the case of a person dying insolvent, as if he were a bankrupt, substituting the date of the death for that of the receiving order.

Damages for injuries done by deceased to the real or personal property of another.

The damages recovered in an action against an executor or administrator, under the stat. 3 & 4 Wm. IV. c. 42, s. 2, in respect of any injury by the deceased to the real or the personal property of another (*q*), are by that statute, directed to be payable in like order of administration as the simple contract debts of the deceased.

Dilapidations

Formerly damages for dilapidations, payable by the executors or administrators of the late incumbent of a benefice to his successor, were postponed, in order of payment, to the debts of the deceased of every description (*r*).

But now the amount and mode of payment of damages for dilapidations payable by the executors or administrators of the late incumbent of a benefice to his successor, are governed by the provisions of the Ecclesiastical Dilapidations Act, 1871 (*s*) (34 & 35 Vict. c. 48). The Bishop, within three months of the avoidance of the benefice, directs the diocesan surveyor to inspect and report to him what sum is required to make good the dilapidations to which the estate of the late incumbent is liable, the executors or administrators of such late incumbent having a right of entry with their surveyor upon the premises of the vacated benefice until the final settlement of the question of dilapidations. The surveyor sends a copy of his report (when made) to the new incumbent, and also to the executors and administrators of the late incumbent, and to this report it is competent to such executors and administrators, as well as to the new incumbent, within one month's time (*t*), to state in writing their objections and transmit them to the Bishop. The Bishop shall in *uncontested* cases, as soon as conveniently may be after the time for the transmission of objections has expired, and in *contested* cases after consideration of the whole matter, make an order stating the repairs and their cost for which the exe-

(*q*) See *post*, Pt. IV. Bk. II. Ch. I.

(*s*) Sects. 29—36.

§ I.

(*r*) *Degge's' Parson's Counselor*, v. 91. *Bryan v. Clay*, 1 E. & B. 2.

(*t*) The Bishop may, however, if he thinks fit, for special reasons, receive objections at a later period, sect. 33.

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cutors or administrators of the late incumbent are liable, and shall send a copy of such order to the new incumbent, another copy to such executors or administrators, and a third copy to the registrar of the diocese (u).

The sum stated in the order as the cost of the repairs, is a debt due from the executors or administrators of the late incumbent, and is recoverable as such at law or in equity (x).

The sum so stated in the order made by the Bishop as the cost of the repairs, is a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors (y).

A very important question arises with respect to contingent debts; viz., whether an executor or administrator can pay legacies, or deliver over a residue, where there is an outstanding covenant, or like obligation of the testator, which may or may not be broken hereafter: And a further question occurs, connected in some degree with the present inquiry, viz., whether, under any circumstances, an executor can be allowed payments made to legatees, as against creditors of whose claims he had no notice. But it will be more convenient to consider these points hereafter, together with the subject of the Payment of Legacies generally (z).

Payment of legacies before contingent debts, or debts of which an executor has no notice.

It may be proper, in conclusion, to consider the subject of the priority of the debts of the deceased with reference to the character of an executor *de son tort*. It has appeared in a former part of this Work, that if a creditor brings an action against such an executor, the defendant may give in evidence, under a plea of *plene administravit*, payments by himself of just debts of the deceased which have exhausted all the assets which have come to his hands (a), although it

Priority of debts with respect to an executor *de son tort*.

(u) Sects. 34, 35.

(x) Sect. 36.

(y) *Re Monk*, 35 C. D. 583.

(z) *Post*, Pt. III. Bk. III. Ch. IV. § 1.

(a) *Ante*, p. 218.

will afford him no defence, that *after action brought* and before plea pleaded, he delivered over such assets to the rightful executor or administrator (*b*). Nevertheless, he is justified, even after action brought, in applying the assets which are in his hands to the payment of a debt of a superior degree. Thus in the case of *Oxenham v. Clapp* (*c*), the plaintiff declared in *assumpsit* against the defendant as executrix for work and labour done by him as the attorney of the deceased: The defendant pleaded, that *since the exhibiting of the bill* she had exhausted the assets which had come to her hands in the payment of a bond debt of her testator: The plaintiff replied, that the defendant was executrix of her own wrong, that she had never been called on to pay, nor had paid the money due upon the bond, and that at the time of exhibiting the bill she had sufficient assets to satisfy the plaintiff: The defendant's rejoinder merely repeated the allegation in the plea, that she had paid the money due on the bond: Whereupon the plaintiff demurred; and, after argument, the Court of K. B. gave judgment upon the demurrer for the defendant.

However, Lord Tenterden observed in this case that he was not prepared to say, that if it had been alleged that the payment had been voluntary, the defendant could have justified paying a debt of equal degree with that of the plaintiff: because that might have been taking an undue advantage of her own wrong.

It may be inferred from that which has been shown in this section with respect to a rightful executor, that when it is laid down that an executor *de son tort* may defend himself, in an action by a creditor, by showing that he has applied all the assets come to his hands in the payment of debts, it must be intended that such debts were of equal or superior degree to those upon which the action is brought (*d*).

(*b*) *Ante*, p 219.

(*c*) 2 B. & Adol. 309

(*d*) 2 Black. Comm. 507, 508.

action brought and such assets to the Nevertheless, he is applying the assets of a debt of a superior *Ham v. Clapp* (c), and the defendant as him as the attorney, that since the assets which had a bond debt of her defendant was executed ever been called on the bond, and that had sufficient assets's rejoinder merely she had paid the plaintiff demurred; gave judgment upon

this case that he then alleged that the defendant could have with that of the in taking an undue

has been shown in executor, that when it is may defend himself, that he has applied all payment of debts, it of equal or superior brought (d).

ck. Comm. 507, 508.

SECTION IV.

Of the payment of an inferior Debt by an Executor or Administrator before a superior, without notice; and of suffering Judgment, on an inferior debt, without notice of a superior.

Having thus considered the priority in degree of the different sort of debts due from the deceased, it remains to point out more particularly how this precedence operates in the course of administration of assets by the executor or administrator (e).

It has already been stated generally, that if an executor or administrator pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer that of a higher out of his own estate (f). But it must be understood, that at the time of such payment, he had notice of the existence of the superior debt: For an executor may voluntarily pay a debt of inferior nature before one of a superior, of which he had no notice (g): otherwise it would be in the power of a superior creditor to ruin an executor, by suppressing his security till all the assets were exhausted in the payment of debts of an inferior degree (h).

Again, it is a general rule, that an executor or administrator is bound to plead a debt of a higher nature in a bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he has not assets for both: otherwise it will be an admission of assets to satisfy both debts (i).

(e) This section has been retained substantially as it stood in the former editions of this Work, though the principles laid down in it will be of much less frequent application than formerly by reason of specialty debts having lost their priority by 32 & 33 Vict. c. 46.

(f) *Ante*, p. 852.

(g) *Harman v. Harman*, 2 Show. 492: Provided a reasonable time has elapsed since the testator's death; for such payment, if precipitate, would be evidence of fraud: *Toller*, 192.

(h) 3 Bac. Abr. 82, tit. Exors. (L.) 2.

(i) *Rock v. Leighton*, 1 Salk.

An executor may voluntarily pay an inferior debt before a superior without notice.

An executor who has suffered judgment on an inferior debt, without notice of a superior, may plead the judgment in bar to the superior creditor.

But it is obvious, that this must also be understood with the qualification that the executor or administrator *had notice* of the superior debt. Accordingly, it was established that an executor or administrator might to an action by a specialty creditor, plead a judgment recovered against him on a simple contract, without notice of the specialty debt, and *riens ultra* (j): For, by reason of having had no notice, it was not in the power of the executor or administrator to prevent the recovery of such judgment, by pleading the outstanding superior debt. But in the plea of judgment recovered to the action by the superior creditor, it must be expressly averred that the executor or administrator had no notice of the superior debt (k).

What shall be sufficient notice to bind the executor.

With respect to what shall be sufficient notice, there is a distinction between debts of record and other debts. For debts of record, an executor or administrator is bound to take notice at his peril; on the principle that every one is presumed to have cognisance of the proceedings in the King's Courts. Thus, in *Littleton v. Hibbins* (l), a *scire facias* was brought against executors, upon a judgment against their testator in debt: They pleaded, that before they had any cognizance of this judgment, they had fully administered all their testator's goods in paying debts upon obligations: And it was thereupon demurred; and after argument, adjudged for the plaintiff, that the plea was bad; for the executors at their peril ought to take cognizance of debts upon record.

310. 1 Saund. 333, a. note. The law gives no opportunity of setting up any debts of a superior nature to that of an inferior, except before a plea pleaded: *Abbis v. Winter*, 3 Swanst. 578, note.

(j) *Davies v. Monkhouse*, Fitzgib. 76. The executor, if he has not assets to satisfy both judgments, must plead as above; for it is held, that if ignorant of the existence of a bond, an executor confess a judg-

ment on the simple contract, and afterwards judgment be given against him on the bond, he is bound, however insufficient the assets, to satisfy both judgments; since he might have pleaded the first, if he had not assets for both: *Britton v. Batthurst*, 3 Lev. 114.

(k) *Sawyer v. Mercer*, 1 Term Rep. 690.

(l) Cro. Eliz. 793.

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The difficulty and hardship upon personal representatives, of finding such judgments, was the occasion of the passing of the statute of 4 & 5 Wm. & M. c. 20, which there has lately been occasion to mention (*m*), respecting the docketing of judgments entered in the Courts at Westminster. Of debts by judgments docketed in pursuance of that statute, and of the subsequent statutes now in force (*n*), and of debts by judgments in inferior Courts of Record, of debts due by recognisance or statute, and other debts of record, such constructive notice to an executor or administrator is sufficient, and he must at his peril give them precedence in payment to debts of inferior degree (*o*).

It must here be observed, that where a judgment has not been docketed pursuant to the statutes, the circumstance that *actual notice* of it has been received by the executor or administrator will not entitle it to any priority or preference in administration; because the effect of the statutes is, that a judgment not docketed in pursuance of them is to be considered only as a simple contract debt (*p*).

But with respect to other species of debts, there must be actual notice; and it has been asserted that such notice must be by suit (*q*). But it seems clear, that an executor, if he be by any means apprised of a debt of a higher nature, would not be justified in exhausting the assets in the discharge of one which is inferior (*r*).

SECTION V.

Of the Power of Preference by an Executor or Administrator among Creditors of equal degree.

The situation of an executor or administrator is frequently one of great difficulty. The law imposes on him the burthen

(*m*) *Ante*, p. 862.

(*n*) See *ante*, pp. 862, 863.

(*o*) Toller, 278, 292.

(*p*) See *ante*, p. 862. Hall v. Tapper, 3 B. & Ad. 655.

(*q*) Brooking v. Jennings, 1 Mod. 175.

(*r*) Toller, 292. Oxenham v.

Clapp, 2 B. & Adol. 312, per Parke and Patteson, J.J.

of paying the debts of the testator or intestate in a particular order. On the other hand, it confers on him certain privileges. One of those privileges is, that among creditors of equal degree, he may pay one in preference to another (s).

But this election may, in some measure, be controlled by legal or equitable proceedings against him, of which it will be proper to take notice in this place.

Of controlling the executor's preference by proceedings at law or in equity.

If one of several creditors of equal degree, suing for himself, sues the executor or administrator and obtains judgment against him, whether in the Queen's Bench or Chancery Division of the High Court, such creditor must be satisfied before the rest, and thus the preference of the executor or administrator is altogether precluded.

Whether an executor after commencement of an action by a creditor can voluntarily pay another creditor of equal degree.

Before the Judicature Act the established rule was that if an executor or administrator had notice of the commencement of an action at law by a creditor, he was restrained from making a voluntary payment to any other creditor of equal degree (t), but if he had notice of the commencement of a suit in equity and before decree he paid any particular creditor in preference, he was allowed such payment in passing his accounts (u).

Since the Judicature Act the rule in equity and not at law prevails (x), and the voluntary payment of a creditor by an executor or administrator with notice of the commencement of an action by another creditor whether in the Queen's

(s) By Abbott, C. J., in *Lytleton v. Cross*, 3 B. & C. 322. Where an executor, having assets of his testator, either in money or goods, before any bill filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum equal to the amount of his debt : and the creditor accepted the personal security of the executor for the amount, and released the debt against the estate, it was held by Wigram, V.-C., that the executor having, by such substitu-

tion of his own security for that of the estate, discharged the debt as against the estate, should not be treated as a mere purchaser of the debt, but was entitled to be allowed the amount of it as a debt of the testator preferred and paid : *Hepworth v. Heslop*, 6 Hare, 561.

(t) *Parker v. Dee*, 3 Swanst. 531.

(u) *Darston v. Lord Orford*, Colles, 229.

(x) *Judic. Act*, 1873, sect. 25, sub-s. 11.

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Bench or Chancery Division of the High Court and *before judgment* is a good payment, and will be allowed to him in passing his accounts (y).

Where a creditor of the deceased sues the executor or administrator in the Chancery Division not for his own debt alone, but *for himself and all other creditors*, and a judgment is obtained for an account and a distribution ; this is considered as in the nature of a judgment for all the creditors (z) : and after such a judgment although the legal priorities of creditors are not affected thereby (a), the power of preference, which the executor or administrator enjoys at law among creditors of equal degree, no longer exists ; for no payment to any creditor, made after notice of the judgment, will be allowed in his account (b).

It may here be observed that where an executor or administrator, before a suit has been commenced for the administration of the estate of the deceased, has paid some of the creditors a certain proportion of their debts, the Court will not make any further payment to them, out of either the legal or equitable assets, until all the other creditors are paid proportionably ; This point was decided by Sir L. Shadwell, V.-C., on the ground, that when a creditor goes into the Master's Office to establish his debt, he must show what was the amount due at the death of his debtor and

An executor cannot pay in preference, after a decree to account in a suit by one creditor for himself and all others :

a creditor who has been partly paid by an executor shall not receive any further payment from the Court until all the other creditors are paid proportionably.

(y) *Re Radcliffe*, 7 C. D. 733 : approved by the Court of Appeal in the late case of *Vibart v. Coles*, 24 Q. B. D. 364.

(z) *Goate v. Fryer*, 3 Bro. C. C. 22. S. C. 2 Cox, 202. *Paxton v. Douglass*, 8 Ves. 520. *Perry v. Phelps*, 10 Ves. 40. Accordingly, where a creditor obtained a judgment against the executor, and on the same day a decree was made for the administration of assets, it was held that the judgment and decree ought to be deemed to have

been obtained at the same moment, and the judgment creditor had obtained no priority : *Parker v. Ringham*, 33 Beav. 535.

(a) *Nunn v. Barlow*, 1 Sim. & Stu. 588.

(b) *Jones v. Jukes*, 2 Ves. 518. *Mitchelson v. Piper*, 8 Sim. 64. *Irby v. Irby*, 24 Beav. 525. But in taking the account, the executor or administrator has a right to stand in the place of the creditor he has paid : *Jones v. Jukes*, 2 Ves. 518.

what he has received since ; and as it is one of the leading maxims of a Court of Equity, that equality is equity, the creditors who have been paid in part ought not to receive any further part either of the legal or equitable assets, until the other creditors have been paid the same proportion of their debts (c).

SECTION VI.

Of the Right of the Executor or Administrator to retain a Debt due to him from the Testator or Intestate.

As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree (d).

He cannot, in any case, retain against a creditor of superior degree.

This remedy arises from the mere operation of law, on the ground that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt : And, therefore, he may appropriate a sufficient part of the assets in satisfaction of his own demand : otherwise he would be exposed to the greatest hardship ; for since the creditor who first commenced an action was entitled to a preference in payment, and the executor can commence no action, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus, from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction (e). But the privilege is accompanied with this limitation, that he

(c) *Wilson v. Paul*, 8 Sim. 63. *Mitchelson v. Piper*, *ibid.* 64.

(d) *Woodward v. Lord Darcy*, Plowd. 184. An executor's right to retain a debt due to himself does not make him a "secured creditor" within the meaning of

sect. 10 of the Jud. Act, 1875, and his right to retain is not affected by that section. *Lee v. Nuttall*, 12 C. D. 61. *Re May*, 45 C. D. 499, 502.

(e) 2 Black. Com. 511.

one of the leading quality is equity, the right not to receive any equitable assets, until the same proportion of

Administrator to retain a
or Intestate.

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section." *Lee v. Nuttall*,
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lack. Com. 511.

should not retain his own debt as against those of a higher degree: for the law places him merely in the same situation as if he had sued himself as executor, and recovered his debt, which there could be no room to suppose during the existence of those of a superior order (f). The right of retainer by an executor has not been abolished by *Hinde Palmer's Act* (32 & 33 Vict. c. 46), nor has it been enlarged so as to enable the executor to retain his debt against a creditor of higher degree than himself (g).

Right of re-
tainer not
abolished by
Hinde Palmer's
Act.

It follows, therefore, that an executor who is only a simple contract creditor of his testator cannot retain his debt as against a specialty creditor (h).

If an executor dies after having claimed a right of retainer without having actually exercised it, leaving another executor

When an
executor of an
executor may
retain.

(f) 3 Black. Com. 18. Com. Dig. Admon. (C. 2.) 1 Saund. 333 (note (6), to *Hancock v. Prowd.*) Godolph. pt. 2, c. 11, s. 3. Toller, 295. However, according to the opinion of other writers, the principle on which the executor's right to retain is founded, is, "*In equali jure potior est conditio possidentis.*" Fonblanq. Treat. Eq. B. 4, Pt. 2, c. 2, s. 2, note (m). Where a mortgagor dies insolvent and the mortgagee then realises his security, and after paying himself the mortgage debt out of the proceeds has a surplus in his hands, he cannot, although he be executor of the mortgagor, retain that surplus in payment of a simple contract debt due to himself from the mortgagor, and so give himself a preference over other creditors of a higher degree, but must hand it over to the mortgagor's legal personal representative as part of his estate: *Talbot v. Frere*, 9 C. D. 568. And see the statement of the principle of "retainer," by Jessel, M. R., in this

case, p. 570. A balance order under the Companies Act against the personal representative of a deceased contributory does not constitute the liquidator a judgment creditor so as to give him a priority and to prevent the exercise by the executor of his right of retainer: *Re Hubback*, 29 C. D. 934.

(g) *Wilson v. Coxwell*, 23 C. D. 764. *Crowder v. Stewart*, 16 C. D. 368. *Re Jones*, 31 C. D. 440.

(h) *Wilson v. Coxwell*, 23 C. D. 764. In this case, where a right of retainer was claimed on behalf of the estate of the executor, the order made was that (1) the costs be paid; (2) the remaining assets be apportioned among all the creditors on the footing of giving them all an equal dividend; (3) the dividend be paid in full to the specialty creditor; (4) the executor to retain his debt out of the residue; (5) the surplus (if any) to be divided equally among the other simple contract creditors.

of the testator surviving, the executors of the deceased executor have the right of retainer for the benefit of his estate (i).

This principle has been subsequently affirmed subject to this restriction, *viz.*, that the executor's right to retainer is limited to so much of the assets of his testator as come into the possession or control of the executor or are paid into Court during his lifetime, and, if after asserting in his lifetime a right of retainer he die without exercising it, it is only in respect of these that his representatives may exercise that right for the benefit of his estate (k).

Executor may retain out of assets received after a judgment for an account.

This privilege of the personal representative to retain for his own debt exists, notwithstanding a judgment for an account has been made, in a suit by the other creditors, for the administration of the assets: and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the judgment: for the judgment does not affect the legal priorities of creditors: and there is no distinction in this respect between assets possessed prior to the judgment, and subsequent to it (l). And in the administration of a testator's estate, the right of an executor to retain for his own debt is not affected by the circumstances that he is himself the plaintiff suing on behalf of himself and all the other creditors, and that he has submitted to account in the ordinary form of an administration decree (m).

Right to retain unaffected by fact that executor is suing on behalf of himself and all other creditors.

An executor who has acquired by bequest from a creditor a debt which the creditor in his lifetime has proved in a suit for the administration of the testator's estate, has no right of retainer in respect of such debt, as if it had originally been due to himself (n).

The right to retain is not

The right of retainer is not lost by the circumstance of

(i) *Wilson v. Coxwell*, 23 C. D. 764.

(k) *Re Compton*, 30 C. D. 15. In this case Cotton, L. J., held that unless the case of *Wilson v. Coxwell* were restricted in this way, that case must be treated as over-

ruled.

(l) *Nunn v. Barlow*, 1 Sim. & Stu. 588.

(m) *Campbell v. Campbell*, 16 C. D. 198.

(n) *Jones v. Evans*, 2 C. D. 420.

of the deceased executor of his estate (i). affirmed subject to right to retainer is as come into or are paid into inserting in his life-revoking it, it is only may exercise that

tative to retain for ment for an account r creditors, for the notwithstanding the debt came to his ent does not affect is no distinction in or to the judgment, inistration of a tes- retain for his own that he is himself and all the other cre- vant in the ordinary

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v. Barlow, 1 Sim. &

pbell v. Campbell, 16

v. Evans, 2 C. D. 420.

the executor or administrator having paid into Court, in a creditor's suit, the money which has been received on account of the assets of the deceased (o): And where the fund in Court is insufficient to discharge the debt of the executor or administrator, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied (p). And the right of retainer by an executor was held to prevail against the plaintiff's right to the costs of the action, and against the debts of the other creditors, in respect of policy moneys paid into Court to the credit of the action by an insurance company, in pursuance of an order made on the application of the plaintiff and in the presence of the executor, on the ground that the payment into Court was in substance a payment by the executor (q).

After a receiver is appointed in an administration action, if assets are collected by the receiver, there is no right of retainer by the executor; but if before the appointment of the receiver the executor has received assets, which he afterwards pays over to the receiver, he has a right of retainer, which he does not lose from the simple fact that the money was paid to the receiver (r). The reason for this seems to be that when a receiver is once appointed, a debtor to the estate may pay his money direct to the receiver and obtain a good

lost by pay-
ment of the
money into
Court.

(o) *Davenport v. Moss*, 14 W. R. 453. *Re Harrison*, 32 C. D. 395.

(p) *Chissum v. Dewes*, 5 Russ. 29. *Langton v. Higgs*, 5 Sim. 228. *Tipping v. Power*, 1 Hare, 405, 411. *Hall v. McDonald*, 14 Sim. 1.

(q) *Richmond v. White*, 12 C. D. 361 (reversing the decision of Hall, V.-C., 10 C. D. 727).

(r) *Re Harrison*, 32 C. D. 395. *Re Jones*, 31 C. D. 440. *Richmond v. White*, 12 C. D. 361. Generally the appointment of a receiver takes effect by the order of appointment upon his giving security, and is of no effect until the security has been

perfected. *Edwards v. Edwards*, 2 C. D. 291. But in a case where an administrator defendant in an administration action was also solicitor to the plaintiff, it was held that the defendant, between the time of the order of the appointment and the perfecting of the receiver's security, stood in no better position than he would have done after the receiver had perfected his security, and therefore could not exercise his right of retainer over moneys paid to him during that time. *Re Birt*, 22 C. D. 604.

discharge, so that the appointment of a receiver prevents the money actually or theoretically coming into the executor's hands, and *without possession there can be no retainer* (s).

No retainer allowed out of equitable assets.

It should seem, however, that an executor cannot retain, out of such of the assets as are merely *equitable*, to pay the whole of a debt due to him from the deceased, but only a proportionable part with the other creditors (t) : For in equity all debts are equal; and a Court of Equity will never assist a retainer (u).

Nor out of estate devised to executor as trustee to pay debts.

A trustee of an estate, devised or conveyed to him for the purpose of paying debts, has no right of retainer thereout whether he is executor or not (x).

(s) *Re Jones*, 31 C. D. 440, 444, *per Kay, J.*

(t) As to the distinction between equitable and legal assets, see *post*, Pt. IV. Bk. I. Ch. I. Real estate is by the stat. 3 & 4 Will. IV. c. 104, made assets for the payment of debts only in equity and an executor has no right of retainer against it. *Walters v. Walters*, 18 C. D. 182. *Re Illidge*, 24 C. D. 654, 655.

(u) *Anon.* 2 Cas. Chanc. 54. *Hopton v. Dryden*, Prec. Chanc. 181. *Bailey v. Ploughman*, Mosely, 95. It was stated by Verney, M.R., that "the rule of this Court in cases of retainer is, unless the party can show a *legal* right to retain, we never give it him : if he can show a *legal* right, we never take it away from him : " *Chapman v. Turner*, Vin. Abr. Exors. (D. 2.) pl. 2. *Re Baker*, 44 C. D. 272.

(x) *Bain v. Sadler*, L.R. 12 Eq. 570. An heir-at-law or devisee has no right of retainer either out of the proceeds of sale of real estate, or out of rents received by him for a debt

due to him on simple contract from the testator or intestate : but *semble*, an heir-at-law or devisee when the estates are not charged with debts, may, notwithstanding *Hinde Palmer's Act* (32 & 33 Vict. c. 46, see *ante*, p. 869), retain a debt to which he is entitled by specialty in which the heirs are bound. *Re Illidge*, 27 C. D. 478 ; reversing the decision of *Chitty, J.* 24 C. D. 654, as regards debts to which an heir-at-law is entitled by specialty in which the heirs are bound.

A devisee who was surety for the testator by specialty in which the heirs were bound (who, if he had paid off the debt would have had a right to the benefit of the specialty) not having paid it off, can only be treated as a simple contract creditor and has no right of retainer ; but a devisee, who is a creditor by specialty in which the heirs are bound, is entitled to retain, because, in the latter case, there is a common law right of action against the heir who is allowed the right of retainer as he cannot sue himself ; whereas,

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An executor or administrator may retain not only for debts which he claims beneficially, but also for those to which he is entitled as trustee. Thus, in *Plumer v. Marchant* (y), A., before his marriage, covenanted with B. and C. to leave them by his Will, or that his executors, within six months after his death, should pay them 700*l.*, in trust to pay the interest to his wife for life, and on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance : On his dying before his wife, without issue and intestate, it was holden that B., in the character of administrator, might retain assets to that amount during the life of the widow, against a bond creditor who sued before the six months were elapsed.

Conversely, the executor or administrator may retain for debts due to another in trust for him (z).

The executor
may retain for
debts due to
him as trustee:

he may retain
for debts due
to him as
cestui que
trust.

in the former case the simple contract creditor could only obtain a judgment as against the real estate for the benefit of himself and all other creditors., *Hinde Palmer's Act*, although it takes away priority of creditors by specialty, does not take away the common law action against the heir-at-law nor the consequent right of retainer : *per Cotton, L.J.*, in *Re Illidge* (ubi sup.) at p. 482, referring to and approving the decision of *Wickens, V.-C.*, in *Ferguson v. Gibson*, L. R. 14 Eq. 379.

The Courts of Common Law recognized the executor's right of retainer in respect of a debt due to him as *cestui que trust* : (*Roskelley v. Godolphin*, T. Raym. 483 ; *Marrion v. Thompson*, Willes, 186 ; *Loane v. Casey*, 2 W. Bl. 965) ; to the extent of debts which according to the trust were payable

to the *cestui que trust*, and provided that the debt or demand was one of which account could be taken by a jury : *De Tastet v. Shaw*, 1 B. & A. 664. However, in Courts of Equity the right of retainer of an executor was recognized in a creditor's suit in respect of a debt, the amount of which could only be ascertained by a Court of Equity : *Re Morris's Estate*, L. R. 10 Ch. 68.

(y) 3 Burr. 1380 (cited 3 A. & E. 858, *per Curiam*). *Sander v. Heathfield*, L. R. 19 Eq. 21. *Crowder v. Stewart*, 16 C. D. 368. One of several executors is entitled to a right of retainer in respect of a mortgage debt due from the testator to a body of trustees of whom that executor is one. *Re Hubback*, 29 C. D. 934.

(z) *Cockroft v. Black*, 2 P. Wms. 298 : *Franks v. Cooper*, 4 Ves. 763 : *Loomes v. Stotherd*, 1 Sim.

Retainer by an administrator *durante minoritate* :

Where the person entitled to administration is an infant, and an administration *durante minoritate* is granted, not only may the administrator retain for his own debt (a), but also if the infant in point of right has a title to retain for a debt due to himself, the administrator may insist on that right (b). So where the creditor is a lunatic, and administration has been granted to the defendant for the use of the lunatic, the right of retainer shall not be prejudiced (c).

by an administrator *durante dementia* :

If administration be granted to a creditor, as such, and afterwards be repealed, at the suit of the next of kin, such creditor shall retain against the rightful administrator (d). On the petition, however, of the other creditors, the Court, on granting administration to a particular creditor, as such, will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own (e); and administration to a creditor is generally so granted (f). But under the common decree against an administrator, who has obtained the letters of administration as a creditor, directing the accounts to be taken in the usual way, and the assets to be applied in a due course of administration in payment of the intestate's debts, the Master has no authority to disallow the administrator's claim to retain, on proof by affidavits that there has been a waiver of the right on his part, by arrangement with the other creditors: In order to justify such a departure from the ordinary course of administering assets in a Court of Equity, there

by a creditor administrator :

& Stu. 461, in which last case Sir J. Leach, V.-C., held that as an executor may retain his own debt or the debt of his trustee, so a devisee of the realty may retain for his own specialty debt or the debt of his trustee. See further on the right of the heir to retain, *Player v. Foxhall*, 1 Russ. Chanc. Cas. 538. *Re Illidge*, 27 C. D. 478.

(a) *Roskelley v. Godolphin*, T.

Raym. 483. Com. Dig. Admon. (F.)

(b) *Franks v. Cooper*, 4 Ves. 764.

(c) *Ibid.* 763.

(d) *Blackborough v. Davis*, 1 Salk. 38.

(e) *Toller*, 106.

(f) *Fonbl. Treat. on Eq. Bk. 4*, Pt. 2, c. 2, s. 2, note (m).

tration is an infant, te is granted, not s own debt (a), but a title to retain for tor may insist on is a lunatic, and defendant for the shall not be pre-

itor, as such, and e next of kin, such administrator (d). reditors, the Court, r creditor, as such, o pay debts of equal y preference of his tor is generally so decree against an rs of administration taken in the usual course of adminis- ts, the Master has r's claim to retain, en a waiver of the he other creditors: from the ordinary urt of Equity, there

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l. Treat. on Eq. Bk. 4,

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ought to be a specific instruction to the Master to that effect (g).

An executor of an executor is entitled to retain, out of the assets, debts due from the testator, either in his own right, or as the executor of the deceased executor (h). So where a bond creditor took out administration *de bonis non* to his debtor, and died before he had made any election in what particular effects he would have the property altered by retainer; it was held that the executor of the creditor, in accounting for the assets of the debtor, might deduct the debt (i).

by executor
of executor :

One of three executors, who is also one of two joint creditors, has a right of retainer in respect of his joint debt (k).

by executor
who is joint
creditor :

But it was held (l), that the administrator *cum testamento annexo* of a deceased executor, in accounting for the executor's receipts of the assets, was not entitled, by way of discharge, to the amount of a debt owing from the testator to the executor jointly with another person as partner, the

by adminis-
trator of
executor to
whom a debt
is due jointly
with another :

(g) *Spicer v. James*, 2 Myl. & K. 387. *Thompson v. Cooper*, 1 Coll. 81.

(h) *Hopton v. Dryden*, Prec. Ch. 180. *Thomson v. Grant*, 1 Russ. Chanc. Cas. 540, *in notis*: But not the executor of one of several executors, one or more of whom is still living: Prec. Ch. 181. Nor can the executors of an executor, if they are not the personal representatives of the original testator, retain assets which never came into the hands or under the control of the original executor, an executor's right of retainer being limited to so much of the assets of his testator as come into the possession or under the control of the executor or are paid into Court during his lifetime. *Re Compton*, 30 C. D.

15. The judgment in this case placed a restriction upon the case of *Wilson v. Coxwell*, 23 C. D. 764, a decision of Pearson, J., in which *Hopton v. Dryden* was distinguished.

(i) *Weeks v. Gore*, 3 P. Wms. 184, note to *Croft v. Pyke*, in which latter case a point arose, but was not decided, *viz.* whether if a debtor dies, having made his creditor executor, and then the executor dies, having intermeddled with the goods, but before probate, and before any election made, his executor can retain.

(k) *Crowder v. Stewart*, 16 C. D. 368. *Re Hubback*, 29 C. D. 934.

(l) *Burge v. Brutton*, 2 Hare, 373.

executor having predeceased such partner, without having, in point of fact, done any act in the exercise of his right of retainer. It was not, however, at all questioned in this case, but indeed conceded by the Court (Wigram, V.-C.) that one of two partners to whom a debt is due, being made an executor, might retain that debt. But it was ruled that if such an executor dies, so that the interest in the debt wholly devolves on his surviving partner, the right of retainer ceases, and cannot be exercised by the representative of the executor.

A widow, the administratrix of her late husband, whose estate was insolvent, was allowed to retain out of the assets come to her hands as administratrix the amount of a loan to him in his business out of her separate estate (*m*).

by executor *de son tort* :

It is clear, as there has already been occasion to show (*n*), that an executor *de son tort* cannot retain for his own debt, even of a superior degree to that upon which he is sued. There is, indeed, one exception to this rule ; for a party who, by stat. 43 Eliz. c. 8, becomes executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator who has obtained the grant fraudulently (*o*), is, by the express provision of that Act, allowed to retain (*p*).

case where the representative of the creditor is also the representative of the debtor :

If the same person be the personal representative both of the creditor and of the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor (*q*).

(*m*) *Re May*, 45 C. D. [499, in which case the operation of sect. 10 of the Judicature Act, 1875, as incorporating the rules of administration in bankruptcy into the administration of the insolvent estate of a deceased person was discussed. The above section does not affect the right of retainer, *Ib.* p. 502, 503. See also *Lee v. Nuttall*, 12 C. D. 61, 65.

(*n*) *Ante*, p. 220.

(*o*) *Ante*, p. 210.

(*p*) Com. Dig. tit. Administrator, (C. 3). Wentw. Off. Ex. Ch. 14, p. 336, 14th edit. *Vernon v. Curtis*, 2 H. Black. 26, note (*b*). Toller, 366.

(*q*) *Burnet v. Dixe*, 1 Roll. Abr. 922. *Exors. (L.) 2. Fox v. Garrett*, 28 Beav. 16 ; in which last case both estates were being

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If there are two joint and several obligors, and one of them dies, having made the obligee his executor, in such case the obligee, if he has not received satisfaction out of the assets of the deceased obligor, may sue the survivor; for, being jointly and severally bound, he may sue which of them he pleases, and though the debt be one, yet the obligations are several; and no assets appear of the value of the debt to retain; and there might be a judgment, against which he could not retain (*r*).

So if the obligor appoint the obligee his executor, and there are no assets out of which he may retain, the obligee may sue the heir if he is bound (*s*).

If two are jointly bound in an obligation, the one as principal, and the other as surety, and on the principal's death, the surety becomes his personal representative, and, on forfeiture of the bond, discharges the debt, he has the ordinary right of retainer for that debt, in preference to all other creditors of equal degree (*t*).

If an executor who is a surety for a debt of a testator, pays the debt, he has, as we have seen, a right of retainer; but he must have paid the debt as surety while he has the assets in

if two are jointly and severally bound, and one makes the obligee his executor, he may either retain or sue the survivor.

A surety, executor of principal who is jointly bound, can retain.

administered by the Court, and it was held that the administrator was bound so to retain at the instance of the parties interested in the creditor's estate.

(*r*) *Crosse v. Cocke*, 3 Keb. 116. *Infra*, Pt. III. Bk. III. Ch. II. § IX.

(*s*) *Wankford v. Wankford*, 1 Salk. 304. See further on this subject, *infra*, Pt. III. Bk. III. Ch. III. § IX.

(*t*) *Boyd v. Brooks*, 34 Beav. 7, affirmed on appeal, 34 L. J. Ch. 605. *Bathurst v. De la Touche*, 34 Beav. 9, *note*. *Wildes v. Dudley*, L. R. 19 Eq. 198. An executor who was surety to the Crown for the testator and has paid the debt of his deceased principal, is

entitled to the Crown's priority in the administration of his principal's estate. *Re Churchill*, 39 C. D. 174. Where the wife of the testator having real estate settled on her for life with a general power of appointment, had appointed it as collateral security for a mortgage debt of the testator and had been left by the testator as his executrix, it was held that her right as surety to be indemnified created a simple contract debt only and did not entitle her to retain as against specialty creditors. *Ferguson v. Gibson*, L. R. 14 Eq. 379. This decision of Wickens, V.-C., was approved by Cotton, L. J., in *Re Illidge*, 27 C. D. 478, 482.

p. 220.

p. 210.

Dig. tit. Administra-
Wentw. Off. Ex. Ch. 14,
h edit. *Vernon v. Cur-*
ack, 26, note (*b*). Tol-

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his control; and therefore where an executor did not make the payment as surety till after the appointment of a receiver, it was held that as at the time he paid the debt there was no money in his hands he had no right of retainer (*u*).

Damages which are arbitrary cannot be retained.

An executor cannot retain against his co-executor:

Damages, which in their nature are arbitrary, such as damages founded on *tort*, cannot be retained (*x*).

Where there are co-executors or co-administrators, each being a creditor of the deceased, the one cannot retain for his own debt to the prejudice of the other; for several joint executors or administrators are considered but as one person in law; the possession of one is the possession of the other; the receipt of one is the receipt of the other; and, therefore, the retainer of one must be considered as the retainer of the other, and must enure, for their mutual benefit, in the discharge of the debts of both in proportion (*y*).

he may retain out of a balance found to be due from himself and his co-executor to the estate.

In *Kent v. Pickering* (*z*), where, in a creditor's suit, a balance had been found, by the Master's report, to be jointly due from two executors to their testator's estate, and one of the executors was a creditor, it was held by Lord Langdale, M. R., that such executor had a right to retain his debt out of the assets consisting of the balance due from himself and his co-executor.

Retainer for debt more than six years old.

It should seem, that an executor or administrator may retain for a debt due to himself though it may be more than six years old; for as an executor may pay a debt to another though he might have pleaded the Statute of Limitations, why may he not pay himself? (*a*). In *Hopkinson v. Leach* (*b*)

(*u*) *Re Harrison*, 32 C. D. 395.

(*x*) *Loane v. Casey*, 2 W. Black. 968, by Blackstone, J. Claims by an executor for breach of a covenant to assign a policy and to replace furniture, if sold, by other furniture of like value, are claims for damages for breach of pecuniary contracts for which there is a certain standard or measure, and

may therefore, on the authority of *Loane v. Casey*, be retained. *Re Compton*, 30 C. D. 15.

(*y*) *Chapman v. Turner*, 11 Vin. Abr. 72, tit. Exors. (D.) 2.

(*z*) 2 Keen, 1.

(*a*) *Post*, Pt. IV. Bk. II. Ch. II. § II.

(*b*) 7 May, 1819. MS. Madd. Pract. 583, 2nd edit.

s. [Pt. III. Bk. II.

Ch. II. § VI.]

Of Retainer.

executor did not make
 ment of a receiver,
 he debt there was no
 tainer (*u*).

arbitrary, such as
 ned (*x*).

administrators, each
 ne cannot retain for
 other; for several
 nsidered but as one
 is the possession of
 receipt of the other;
 st be considered as
 re, for their mutual
 of both in propor-

a creditor's suit, a
 report, to be jointly
 s estate, and one of
 l by Lord Langdale,
 retain his debt out
 ue from himself and

administrator may
 t may be more than
 ay a debt to another
 tute of Limitations,
opkinson v. Leach (*b*)

fore, on the authority of
 Casey, be retained. *Re*
 30 C. D. 15.
oman v. Turner, 11 Vin.
 t. Exors. (D.) 2.
 en, 1.

Pt. IV. Bk. II. Ch. II.

ay, 1819. MS. Madd.
 2nd edit.

Sir John Leach, V.-C., was of opinion that the executor might retain in such a case: But his Honor directed the opinion of a Court of Law to be taken. The right to retain was confirmed in *Stahlschmidt v. Lett* (*c*).

An executor or administrator cannot, however, retain a debt due to himself if it is such as he is prevented from enforcing by reason of the Statute of Frauds (*d*).

(*c*) 1 Sm. & G. 415. See also
Hill v. Walker, 4 Kay & J. 166.
Accord. So the creditor of an
 intestate is entitled to a grant of
 administration, although his right

of action is barred by the statute.
Coombs v. Coombs, L. R. 1 P. & D.
 288.

(*d*) *Re Rowson*, 29 C. D. 358.

END OF VOLUME I.